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**“It’s just common sense”: How the (re)production of nostalgia sustains the sex binary
and perpetuates oppression in U.S. politics and culture.**

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Abstract

Discourse within transgender studies concerning anti-transgender rhetoric is often preoccupied with the removal and denial of transgender rights. The existing literature pays significantly less attention to the role of nostalgia in (re)producing the sex and gender binary which serves as the foundation for anti-transgender violence both on a structural and interpersonal level. An analysis of how seeds of nostalgia are sown and fertilised within society through law, architectural and technological design, and feminist discourse helps us understand how the ideology that sex is binary and immutable is ostensibly neutralised through its presentation as ‘common sense’ and ‘natural order’. This dissertation is organised into three parts. Chapter One explores how definitions of biological sex have historically been and are currently being contested in U.S. law. The chapter examines how the Trump administration’s deliberate denial of sex variation and its complexities, and their depiction of transgender people as economically taxing to America, presents the solidification of the sex binary as a part of making America great again. Through the infamous ‘bathroom debates’ Chapter Two examines how as a result of people’s sense of identity being challenged alongside the sex binary, people cling on to material sites as indicators of a ‘past’ stability and permanence. How design is used as a tool of capitalism to cement the sex binary within Western culture, and the subsequent proliferation of anxieties and policing that has arisen as transgender people seek to relieve themselves is illustrated. Chapter Three explains how despite the argument put forward by trans-exclusionary radical feminists that binary biological sex difference is fundamental to womanhood, this is not the case. The desire to deny women the status of womanhood on a biological basis is not new, but has been (and is still) used to deny Black women, transgender women and intersex women womanhood. Therefore this dissertation scrutinises the ideology that biological sex is binary and immutable. It highlights how this binary is (re)produced and (re)constructed through nostalgia, and emphasises that any thought that does not work towards deconstructing the sex binary will ultimately (re)produce gendered, racist and patriarchal oppression.

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Introduction

On January 6, 2019, Dana Martin, a 31 year-old Black transgender woman, was found dead in a ditch on the roadside in Montgomery, Alabama. She was discovered inside her vehicle with a fatal gunshot wound, and was pronounced dead at the scene.¹ No arrests were made.

On May 18, 2019, Muhlaysia Booker, a 23 year-old Black transgender woman was found lying dead, face down, near a golf course in east Dallas.² She died from a fatal gunshot wound. This attack followed the circulation of a video on social media in April of Booker being brutally attacked and assaulted outside the Royal Crest Apartment on Wilhurt Avenue in south Dallas.³ The disturbing video shows Booker being dragged across the ground and repeatedly kicked, punched and stamped on in the face, head and body, surrounded by multiple people. The attack resulted in Booker sustaining a broken wrist and concussion.

Transgender rights activists in Dallas called for Edward Thomas, a man that was identified and arrested as one of Booker's assailants, to be charged with a hate crime. However, despite the footage and the clear graphic nature of the violence in the video, Dallas Police asked the FBI whether Booker's assault qualified as such a case.⁴ Thomas was eventually charged with aggravated assault. According to the arrest warrant, it was found that Thomas was told that he would receive two-hundred dollars in payment upon beating Booker.⁵ After the incident, Booker spoke out making a statement that now proves to be increasingly potent and

¹ Human Rights Campaign Staff, "HRC Mourns Dana Martin, the First Known Transgender Person Killed in 2019," *Human Rights Campaign News*, January 10, 2019, <https://www.hrc.org/blog/hrc-mourns-dana-martin-the-first-known-transgender-person-killed-in-2019>.

² Human Rights Campaign Staff, "HRC Mourns the Loss of Muhlaysia Booker," *Human Rights Campaign News*, May 20, 2019, <https://www.hrc.org/blog/hrc-mourns-the-loss-of-muhlaysia-booker>.

³ CBSN Dallas, "Transgender Woman Muhlaysia Booker Found Dead In East Dallas," *CBSN Dallas DFW News*, May 19, 2019, <https://dfw.cbslocal.com/2019/05/19/transgender-woman-muhlaysia-booker-fatally-shot-east-dallas/>.

⁴ CBSN Dallas, "Transgender Woman Badly Beaten In Viral Video Speaks Out, Thanks Community For Support," *CBSN Dallas DFW*, April 20, 2019. <https://dfw.cbslocal.com/2019/04/20/transgender-woman-badly-beaten-dallas-viral-video-speaks-out/>.

⁵ Ibid.

harrowing. She stated: “This time I can stand before you; whereas in other scenarios, we are at a memorial”.⁶

As of October 14, 2019, at least twenty-one transgender or gender non-conforming people had been killed as a result of a fatal shot or other violent means in the U.S., as recorded by the Human Rights Campaign (HRC).⁷ In 2018, at least twenty-two transgender and gender non-conforming people were killed. HRC statistics show that eighty-two percent of the victims were women of colour, sixty-four percent were under the age of thirty-five, and fifty-five percent of the transgender and gender non-conforming people that were killed lived in the South.⁸ In addition to the incidents that go unreported or are not discovered, the misgendering of transgender victims by law enforcement and in media reports often means that such victims of murder and assault are underreported and miscategorised. This decreases the number of transgender deaths that come to light further. In 2017-18 at least seventy-four percent of the *known* victims of anti-transgender violence were misgendered in the initial police and subsequent media reports concerning their death.⁹ These statistics are particularly distressing as a number of incidents of anti-transgender violence have been deemed justifiable due to what has been labelled the ‘trans-panic defence’. The trans-panic defence, similar to the gay-panic defence is when the attacker claims that upon the realisation of the victim’s identity, the attacker is sent into a panic and reacts in a violent manner as a result. This tactic has been employed by perpetrators of anti-transgender violence and their legal

⁶ Ibid.

⁷ Human Rights Campaign Staff, “Violence Against the Transgender Community in 2019,” *Human Rights Campaign News*, December 31, 2019, <https://www.hrc.org/resources/violence-against-the-transgender-community-in-2019>.

⁸ Human Rights Campaign Staff, “A National Epidemic: Fatal Anti-Transgender Violence in 2018,” *Human Rights Campaign News*, December 31, 2018, <https://www.hrc.org/resources/a-national-epidemic-fatal-anti-transgender-violence-in-america-in-2018>.

⁹ Ibid.

teams in order to strengthen their case, explaining their actions and often in an attempt to excuse them.

As noted by the American Bar Association (ABA), the trans-panic defence predominantly takes three forms: defence of insanity or diminished capacity, defence of provocation, and defence of self-defence.¹⁰ The defence of insanity or diminished capacity defence presents the argument that the victim's gender identity caused the defendant to experience panic. The provocation defence argues that a victim's 'advances', particularly non-violent sexual advances, were 'sufficiently provocative' to impel the defendant to kill the victim. The self-defence argument consists of the claim that as a result of the victim's gender identity, the victim was likely to inflict violence and bodily harm on the defendant.¹¹ Only eight states as of July 1, 2019 had passed legislative bans on the legitimate usage of the gay/trans-panic defence in legal cases. Additionally despite the removal of gay/trans-panic as a legitimate disorder from the *Diagnostic and Statistical Manual of Mental Disorders* by the American Psychological Association in 1973, legal defence teams still continue to use it.¹² Kristen Schilt and Laurel Westbrook investigate examples of where trans-panic has resulted in the death of a transgender woman, focusing on instances where the perpetrator was a cisgender (non-transgender) straight man. Schilt and Westbrook note that most instances where the trans-panic defence is used revolve around sexual interactions between the victim and attacker. Their research found that the victim and attacker in instances of fatal violence in private sexual interactions were usually strangers or recent acquaintances. Upon the pair becoming sexual, "the cisgender man discovers the transwoman's penis and reacts with

¹⁰ Alexandra Holden, "The Gay/Trans Panic Defense: What It is, and How to End it," *American Bar Association*, April 01, 2020, <https://www.americanbar.org/groups/crsj/publications/member-features/gay-trans-panic-defense/>.

¹¹ Ibid.

¹² Ibid.

physical violence.”¹³ In the examples that Schilt and Westbrook present, the resulting violence is as a result of the attackers “feeling deceived by the transwomen about their ‘true gender’ and ‘tricked’ into a homosexual encounter.”¹⁴ Schilt and Westbrook explain that the perceived ‘deception’ in these encounters “is a dual one”, where the victims are believed to have lied about both their ‘true gender’ and their sexual orientation.¹⁵ It is thus deducible that true gender in these encounters refers to a person’s sex and genitalia, and the roles in regards to both gender and sexuality that the victim supposedly should have been following.¹⁶

Talia Mae Bettcher unpacks this concept of deception that is cited in the trans-panic defence in her work ‘Evil Deceivers and Make-Believers: On Transphobic Violence and the Politics of Illusion’. Bettcher highlights that the stereotype that transgender people are ‘deceivers’ comes from the assumption that gender presentation, one’s appearance and how they choose to dress and carry themselves, is congruent with their genitalia. People that are discovered to not align with this assumption are considered to be deceivers. The sexed body is thus coded as a hidden sexual reality that upon disclosure establishes whether the individual is in fact ‘really a man or a woman’.¹⁷ Bettcher develops her point further by drawing attention to the fact that the trans-panic defence “demonstrates that a representational or communicative relation is taken to hold between presentation and body.”¹⁸ The idea of transgender people presenting a misalignment that is tantamount to lying, suggests that those who are “correctly aligned” and are read as gender-normative, are telling the truth about what genitalia they possess, and consequently their sex.¹⁹ People whose gender presentation and

¹³ Kristen Schilt and Lauren Westbrook, “Doing Gender, doing heteronormativity: ‘Gender Normals,’ Transgender People, and the Social Maintenance of Heterosexuality,” *Gender & Society* 23, no. 4 (2009): 453.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, 454.

¹⁶ *Ibid.*, 455.

¹⁷ Talia Mae Bettcher, “Evil Deceivers and Make-Believers: On Transphobic Violence and the Politics of Illusion,” *Hypatia* 22, no. 3 (2007): 48.

¹⁸ *Ibid.*, 52.

¹⁹ *Ibid.*, 53.

sexed body ‘misalign’ are frequently subject to forced genital exposure as sex verification.²⁰ Bettcher illuminates the case of Gwen Araujo, a transgender woman who on October 3, 2002, in Newark, California, was subjected to forced genital exposure in the bathroom at a party in a private home, after which it was announced that ‘he was really a man’.²¹ After this incident, on the same night at the party, in front of other partygoers, Araujo was “beaten, killed, and then buried 150 miles away in the Sierra wilderness.”²² It is therefore extremely clear that the perceived incongruence between genitalia and gender presentation, and how attackers view themselves, their own gender identity and sexual orientation in relation to a trans person, triggers anti-transgender violence.

Other academics have noted that violence as a result of people not conforming to sex and gender stereotypes does not end with just physical violence for transgender people. Violence manifests itself in other expressions of anti-trans and anti-gender-non-conforming sentiment. In addition to addressing how transgender people are viewed as deceitful, and how trans women in particular are dehumanised and subject to a specific form of violence, Doug Meyer investigates how transgender people experience institutional discrimination and violence. Meyer examines how trans people often encounter employment discrimination, particularly when undergoing the process of transitioning.²³ The impact that the sex segregation of prisons and homeless shelters has on trans women is also noted by Meyer. The widespread violence that trans women in particular experience as they are housed with cisgender men in prisons and shelters often results in trans women choosing to live on the streets instead of routinely experiencing abuse in shelters as a result of their non-inclusive

²⁰ Ibid.

²¹ Ibid., 43.

From this point onwards ‘transgender’ and ‘trans’ will be used interchangeably.

²² Ibid.

²³ Doug Meyer, *Violence Against Queer People: Race, Class, Gender, and the persistence of anti-lgbt discrimination* (New Jersey: Rutgers University Press, 1980), 137.

policies.²⁴ The policies that discriminate against transgender people in employment, family law and disability law, with a particular emphasis on the role that binary sex categories has in such laws, is expansively delved into by Taylor Flynn, Julie A. Greenberg, Jennifer L. Levi and Bennett H. Klein, and Kylar W. Broadus.²⁵ How trans people are often in a double bind and unable to navigate an oppressive legal system without compromising their livelihood, safety, or sense of self is illustrated. Stress is additionally placed on inclusion within these policies needing to incorporate trans people in a bid to reduce the administrative and institutional violence that they are subject to, as well as the concept of sex needing to be redefined.²⁶

This approach to looking at anti-trans violence has been criticised by Dean Spade. The method of calling for inclusion within anti-discrimination policies and legislation is deemed ineffective by Spade, as employing the same methods of movements such as the lesbian and gay, feminist, and civil rights, involves recapitulating their limits.²⁷ Centring trans politics on acquiring legal recognition and making equality claims is not the way forward. Instead, Spade calls for what he terms a ‘critical trans politics’: “that is a trans politics that demands more than legal recognition and inclusion, seeking instead to transform current logics of state, civil society security, and social equality.”²⁸ In order to achieve this, Spade lays out the importance of the union of transgender organising, and the “specific sites of intersection where trans activists and organizers can and are finding common cause”. Although Spade also addresses issues concerning police and prisons, and other issues that affect trans people such as immigration enforcement and wealth distribution, Spade focuses

²⁴ Ibid., 144.

From this point onwards ‘cisgender’ and ‘cis’ will be used interchangeably.

²⁵ Paisley Currah, Richard M. Juang, and Shannon Price Minter, *Transgender Rights* (Minneapolis: The University of Minnesota Press, 2006).

²⁶ Ibid., 89.

²⁷ Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, & The Limits of Law* (Durham: Duke University Press, 2015), 1.

²⁸ Ibid.

on knowledge production. Spade examines how power is disseminated through institutions, dictating how people act, and what they know. The significance of disciplinary modes of power and how individuals learn the norms and rules of what is respectable is investigated. The population-level interventions where external factors that affect the structure of healthcare, schools, police presence, and housing, and how trans people are discriminated through these interventions is emphasised.²⁹ Yet despite these theorisations of how power operates to limit transgender people's life chances, and the documentation of the various forms of violence that transgender people face, anti-trans violence continues to escalate. Although the debunking of biological sex and addressing how current definitions of sex and gender do not account for everybody is important, getting to the root of how these definitions are sustained is a priority. Doing so reveals why and how anti-trans violence continues to persist. This is fundamental in understanding how to quell the oppression of those who do not conform to the gender and sex binary.

Upon examination of the current literature concerning anti-trans violence, it has become strikingly clear that such sentiment is significantly emotionally charged. However, despite anti-trans violence typically originating when the perpetrator of said violence holds opinions that have issues with gender transgression, the debunking of said violence has not involved drawing acute attention to the rhetoric and emotions that inspire the acts. A critical analysis of where these emotions come from and how they are mobilised is crucial when working out how emotionally-charged rhetoric is augmented and sustained. This is also necessary to see how rhetoric (trans)forms into acts of anti-trans violence both physical and legislative. Such an analysis involves investigating: *why* it is that definitions of biological sex that have been long since shown to be outdated and ill-equipped for usage are still being held on to and propagated as 'common sense'; *what* such outdated definitions and a desire to hold

²⁹ Ibid., 65-66.

onto them represent and what this highlights concerning the individuals who choose to hold on; *who* is perpetuating these definitions and making sure that they are sustained; and *where* these definitions and the ideologies that they facilitate are being broadcast, and the significance of this. The current proliferation of anti-trans violence, particularly under the Trump administration, does not only call attention to how necessary such an examination is and how fruitful it can be in tackling transphobia. Rather, it also provides an efficacious lens through which to deconstruct the persistence of anti-trans sentiment.

The Trump administration and its visible impact on contemporary U.S. culture serves as an apex of anti-trans emotionally-charged rhetoric culminating into forms of violence against the community. Under the Trump administration, a ban was placed on transgender service members within the U.S. military, which put service members at risk of discharge if they openly declared their transgender status, or if it was discovered.³⁰ The administration have additionally allowed for trans people to be discriminated against in healthcare, the work place, family adoption agencies, and homeless shelters, as long as the people within such businesses and organisations can cite “religious reasons” for doing so.³¹ In addition to these actions and numerous others by the Trump administration, their rescinding of trans protections coincides with the narrative of Trump’s aims as President to ‘Make America Great Again’.³² Matthew Flisfeder notes that the concept of making America great again suggests that an idea of American-ness as a world with a shared sense of meaning has been

³⁰ National Center for Transgender Equality, “The Discrimination Administration: Trump’s record of action against transgender people,” *National Center for Transgender Equality*, January 20, 2017-Present, <https://transequality.org/the-discrimination-administration>.

³¹ Ibid.

³² Amanda Terkel, “Trump Administration Rescinds Protections For Transgender Students,” *Huffington Post*, February 22, 2017, https://www.huffingtonpost.co.uk/entry/donald-trump-transgender_n_58ac4fe8e4b0a855d1d9d278?ri18n=true&guccounter=1&guce_referrer=aHR0cHM6Ly9jb25zZW50LnlnhaG9vLmNvbS8&guce_referrer_sig=AQAAAAPEUVdJD180J85BZ_t2Av-CcvEUIWIJ950ZKOLr9sAveXqoyJl2DJdzsfw-upiQNrTD9NKnO03MdeXRb51YyNjXmh9Nfn41JgZl1-RvQQCr9ErOBjoxb-ccUEHJUbeB402mARvFovt7FYYdRSx3igoFGLM066y51TtKE9bCoj.

lost.³³ It is this shared sense of meaning that Trump's America wishes to regain and exploit. Chapter One explores how this longing for a shared sense of meaning regarding the definition of biological sex rooted in the sex binary pervades the politics and rhetoric of Trump's government. How the Trump administration sow seeds of nostalgia concerning what it means to 'male' or 'female' by tapping into the emotions of the U.S. public is explored. The active production and weaponisation of this nostalgia and how this generates anti-trans sentiment and violence is investigated. Whether such a binary and stable past is real or imagined, or whether "the apparently stolen object [by the constitutive outsider who is fetishized in nationalist ideology] of enjoyment never actually existed in the first place," is then able to be determined.³⁴

Although it is contentious as to whether the objects of a nostalgic desire, in this case the definition of biological sex as binary and fixed ever actually existed, the anxieties that this nostalgia comes from, namely the challenging of ideologies and a sense of flux are extremely evident. For indeed, as Alistair Bonnett states, "while nostalgia is sentimental, its connection to experience means that it may be less purely wishful than other forms of emotional transference."³⁵ A vivid example of nostalgia leading to anti-trans sentiment being connected to experience is present in what has been labelled 'the bathroom debates'. The bathroom debates concern whether trans people should be able to use the bathroom that aligns with their gender identity as opposed to the sex that they were assigned at birth. Over the past decade, particularly gathering momentum over the last few years, the bathroom debate has been thrust into the spotlight as a trans issue. A number of states have drawn up legislation in response to the debate, some protecting trans individuals, others discriminating against them.

³³ Matthew Flisfeder, "'Make America Great Again' and the Constitutive Loss of Nothingness: An American Nightmare," *Third Text* 32, no. 5-6 (2018): 648.

³⁴ Flisfeder, "'Make America Great Again' and the Constitutive Loss of Nothingness," 653.

³⁵ Alistair Bonnett, *Left in the Past: Radicalism and the Politics of Nostalgia* (New York: Bloomsbury Academic & Professional, 2010), 10.

As the public bathroom is a concrete physical space that is commonly segregated according to the concept of sex as binary, the bathroom serves as a physical locale, pinpointing a tangible site where nostalgic emotions for definitions of sex that align with what these bathrooms symbolise can proliferate. As “longings for lost places, peoples, and times represent a desire to bridge past experience and present conditions”, and present conditions consist of cultural unrest and competing ideologies, Chapter Two explores how the sex-segregated public bathroom is a home-site, that the nostalgic wish to return to.³⁶ The transcripts of the debate sessions concerning ‘bathroom bills’ in North Carolina and California are examined to this effect. Through these debates the lack of shame and need for repression around longing for the sex-segregated public bathroom, in conjunction with the visible discomfort “with the emerging contours of modern American society and harbored skepticism about the vaunted ideals of progress and individualism” becomes clear.³⁷ How nostalgia operates in determining the elusiveness of the public bathroom as a home-site and who can ‘return’ to this home become particularly significant.

As anti-trans sentiment and violence are sustained by the emotions and rhetoric of those whose ideologies concerning sex do not accommodate trans people, examining how nostalgia operates in trans-exclusionary spaces is imperative to debunking the sustenance of transphobia. Whether it be through social media, newspaper articles, the policy of women’s organisations, or academic literature, the persistence of trans-exclusionary feminists resisting the incorporation of trans women into their definitions of womanhood as a result of their beliefs concerning biological sex is undeniable. As Susan J. Matt highlights, “both homesickness and nostalgia may represent individuals’ attempts to establish continuity with

³⁶ Susan J. Matt, “You Can’t Go Home Again: Homesickness and Nostalgia in U.S. History,” *The Journal of American History* 94, no. 2 (2007): 471.

³⁷ *Ibid.*, 485.

past selves.”³⁸ Therefore Chapter Three examines how competing ideologies concerning biological sex have resulted in (white) feminism historically excluding various women from their definitions of womanhood, and how the exclusion of trans women is reminiscent of this. Consequently, this dissertation provides considerable insight into how transphobia is maintained and allowed to proliferate today. By investigating how the (re)generation and weaponisation of nostalgia inspires anti-trans rhetoric and thus violence, this dissertation provides a holistic analysis of how and why regressive ideologies are maintained. It becomes evident who these ideologies benefit and who they oppress, enhancing means to pushback against transphobia as well as gender-based and sex-based oppression.

³⁸ Ibid., 470.

Chapter One

Making America Sexed Again: How the Sex Binary is Solidified Through Nostalgia and Administration

Over the course of President Donald Trump's term in office, defining biological sex as binary and immutable and undoing protections for transgender people has been a preoccupation of his administration. How the persistent focus on biological sex and defining it in direct conflict with transgender and intersex people's rights fits into President Trump's aims to 'Make America Great Again' is a question that needs to be addressed. Matthew Flisfeder notes that the principle of making America great *again* "implies its loss, which signifies its world already having ended," and a desire to regain such a world.¹ Investigating whose world has ostensibly ended determines who Trump's audience is and those who have identified with the importance of upholding both the sex and gender binary. The nostalgic seeking for this lost world resonated with "angry white Americans" who through President Trump's goals were able to latch "onto a nationalism and protectionism that spoke to their economic hardships at a time when they were also losing political power and social status."² As transgender people and those that disrupt the sex and gender binary have been presented as a financial burden by the Trump administration, and with the advancement of LGBTQ+ rights over the past decade, those who feel that their grievances have been overlooked by previous governments believe their social status and power to be diminishing. Although "power losses, by themselves, don't automatically produce collective response," they can "make us receptive to social movements and vulnerable to politicians who promise to restore our place in

¹ Flisfeder, "'Make America Great Again' and the Constitutive Loss of Nothingness," 648.

² Rory McVeigh and Kevin Estep, *The Politics of Losing: Trump, the Klan, and the Mainstreaming of Resentment*, (New York: Columbia University Press, 2019), 222.

America.”³ As transgender people and their rights have been presented as clashing with the place of President Trump’s supporters on the economic ladder, “these kinds of promises [to make America great again] to restore power are even more potent, because they draw on cultural solidarity of the aggrieved group and place blame on cultural outsiders.”⁴

Consequently seeking a world that re-establishes their place economically and culturally becomes imperative, and maintaining an ideology that both does this and represents this is fundamental, regardless of whether such a world has ended or not and if it ever existed in the first place.

However, examining the nostalgia that President Trump’s mantra engenders and evokes from his supporters is not as simple as labelling such nostalgia as negative and reductive. As Pickering and Keightley point out, “to condemn, therefore, nostalgia solely on the position that it ... functions as a false historical consciousness denies us the opportunity to explore further how the past may actively engage with the present and the future.”⁵ Rather, nostalgia allows for critical social commentary and critical transformation; thus “such an understanding of nostalgia cannot be subsumed entirely within a ‘negative’ view.”⁶ Looking into the narrative maintaining that biological sex is binary and immutable and how nostalgia operates within this ideology helps us understand that the struggle concerning the sex binary is not new, and that whether there was ever a past in which sex was binary and immutable is complex. Examining how and why the sex binary has come to be embedded in U.S. culture and politics, where the binary’s disruption is coming from, and the feelings that such tension and challenging of the binary engenders from those who long for stability is crucial.

³ Ibid., 223.

⁴ Ibid.

⁵ Michael Pickering and Emily Keightley, “The Modalities of Nostalgia,” *Current Sociology* 54, no. 6 (2006): 931, quoted in Michalinos Zembylas, “Reclaiming nostalgia in educational politics and practice: counter-memory, aporetic mourning, and critical pedagogy,” *Discourse: Studies in the Cultural Politics of Education* 32, no. 5 (2011): 641-642.

⁶ Ibid.

In response to the “increasing number of questions from parents, teachers, principals, and school superintendents about civil rights protections for transgender students,”⁷ on May 13, 2016, the Department of Justice and the Department of Education under the Obama administration (January 20, 2009 – January 20, 2017) released a letter of ‘significant guidance’. This guidance was presented in the form of a ‘Dear Colleague Letter on Transgender Students’ that sought to demonstrate how transgender students’ gender identity was protected under federal law, specifically under Title IX of the Education Amendments Act of 1972.⁸ Title IX states: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”⁹ Interpreting protections against sex discrimination to cover discrimination against a person’s transgender status, the Obama administration declared that the Title included gender identity protections, and advised schools to treat a student’s gender identity as their sex.¹⁰ Such guidance and an interpretation of Title IX sparked outrage within school districts across the U.S. and came under a huge amount of criticism.

The document failed to clearly and explicitly provide an explanation of how and why gender identity discrimination is protected under Title IX, and most importantly how gender identity discrimination falls under sex discrimination, in support of the administration’s interpretation. This failure was particularly prominent as gender identity as a protected

⁷ Ibid., 2.

⁸ U.S. Department of Justice, Civil Rights Division, and U.S. Department of Education Office for Civil Rights, “Dear Colleague Letter on Transgender Students: Notice of Language Assistance,” *Archived Information*, May 13, 2016.

Title IX of the Education Amendments Act 1972 shall now be referred to as Title IX throughout the rest of this dissertation.

⁹ U.S. Department of Health & Human Services, “Title IX of the Education Amendments of 1972,” *Office for Civil Rights Headquarters*, <https://www.govinfo.gov/content/pkg/USCODE-2010-title20/pdf/USCODE-2010-title20-chap38.pdf>.

¹⁰ U.S. Department of Justice, and U.S. Department of Education, “Dear Colleague Letter on Transgender Students,” 2.

characteristic has been included separately from sex protections in human rights protections in state laws. Although in 2014, Eric Holder, the Attorney General under the Obama administration issued a memorandum regarding why sex protections should be defined to include transgender people, the significant guidance of 2017 did not reference it. Holder's memorandum addressed the definition of sex in Title VII of the Civil Rights Act of 1964.¹¹ Title VII prohibits employment discrimination based on race, colour, religion, sex and national origin.¹² Holder's memorandum stated that:

[a]lthough Congress may not have had such claims in mind when it enacted Title VII, the Supreme Court has made clear that Title VII must be interpreted according to its plain text, noting that 'statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.' *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998).¹³

Holder argued that as a result of looking at the "plain meaning" of Title VII, taking the words of the text at face-value, discrimination "because of . . . sex" includes discrimination "based on an employee's transitioning to, or identifying as, a different sex altogether."¹⁴ By not referring to this memorandum or sufficiently explaining their interpretation and definition of sex under Title IX in their significant guidance, the Obama administration was accused of attempting to re-write federal law.

Within a month of assuming power the Trump administration (January 20, 2017 – Present) withdrew and rescinded the Obama administration's guidance, stating their opposition to it by releasing their own Dear Colleague Letter memorandum on transgender

¹¹ Title VII of the Civil Rights Act of 1964 shall now be referred to as Title VII throughout the rest of this dissertation.

¹² U.S. Equal Employment Opportunity Commission, "Title VII of the Civil Rights Act of 1964," *U.S. Equal Employment Opportunity Commission*, <https://www.eeoc.gov/laws/statutes/titlevii.cfm>.

¹³ U.S. Department of Justice, "Memorandum: Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964," *Office of the Attorney General: Washington D.C.* 20530. December 15, 2014, <https://www.justice.gov/file/188671/download>.

¹⁴ *Ibid*.

students on February 22, 2017. The Dear Colleague Letter stated that Trump's administration would not rely on the views expressed in the previous administration's document.¹⁵ On October 4, 2017, the Trump administration rescinded Holder's 2014 memorandum. Jeff Sessions, the Attorney General at the time, issued a memorandum to the other Heads of Department Components that "revised treatment of transgender employment discrimination claims under Title VII."¹⁶ Sessions argued that sex "is ordinarily defined to mean biologically male or female," and that the Title should be interpreted as it was by Congress at the time it was deployed, stressing that transgender people and gender identity therefore does not fall under Title VII sex protections.¹⁷ By referring to the sex binary as the 'ordinary,' Sessions reinforces the idea that there are only two sexes. By locating this idea in the past as a basis for its continuation into the present, Sessions suggests that this past has an authenticity that should be heeded.

In addition to this, on October 21, 2018, *The New York Times* broke the news that a memorandum from the Department of Health and Human Services had been leaked containing details that could result in transgender people being "defined out of existence".¹⁸ The article states that the Trump Administration were considering defining sex as "a person's status as male or female based on immutable biological traits identifiable by or before birth," and thus "the sex listed on a person's birth certificate, as originally issued, shall constitute definitive proof of a person's sex unless rebutted by reliable genetic evidence."¹⁹ This

¹⁵ U.S. Department of Justice, Civil Rights Division, and U.S. Department of Education Office for Civil Rights, "Dear Colleague Letter: Notice of Language Assistance," *Archived Information*, February 22, 2017.

¹⁶ U.S. Department of Justice, "Memorandum For All Component Heads and United States Attorneys: Implementation of Memorandum on Federal Law Protections," *Office of the Attorney General: Washington D.C. 20530*. October 4, 2017, https://www.justice.gov/opa/press-release/file/1001886/download?utm_medium=email&utm_source=govdelivery.

¹⁷ Ibid.

¹⁸ Erica L. Green, Katie Benner, and Robert Pear, "'Transgender' Could Be Defined Out of Existence Under Trump Administration," *New York Times*, Oct 21, 2018, <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>.

¹⁹ Ibid.

development crucially highlights the very real consequences of defining protected characteristics. With the evident desire for sex to be (re)defined by the U.S. population and those in power, it is clear that how sex is defined determines who gets included and excluded from rights protections. Most often it is transgender and intersex individuals that are significantly harmed in the exclusionary loop that sex discrimination and definition discourse is caught in.

In recognising the power and consequences of definitions within law and the act of defining itself, the Roman maxim *omnis definitio in lege periculosa* (every definition in law is dangerous) states it best. A danger of the law is in part a result of how much bearing their linguistic function has on their legal function. Meir Sheli notes that when drafting legislation, deciding the language and specific words to use “in order to achieve maximum accuracy, clarity, brevity and beauty, and the hierarchy of their value – according to their order,” is the ultimate aim of the draftsman.²⁰ It is in the legislator’s interest to create a lexicon that avoids ambiguity, uses concise language and thus construct definitions that minimise vagueness and maintain consistency.²¹ Even as within language a word can have different meanings, it is important that any vagueness in written law concerning such terms is avoided where possible in order to limit confusion, conflict, misunderstanding and misinterpretation. Definitions become a central anchor in this feat.²² The Obama administration’s significant guidance and its reception serves as a clear example of how vagueness concerning historically contested terms causes confusion. The issue of vagueness concerning definitions is of extreme importance concerning the scope of sex as a protected characteristic within Title IX and Title VII.

²⁰ Meir Sheli, “Source and Innovation in Legal Drafting,” *Hapraklit Law Review* 10, (1953): 346.

²¹ Yaniv Roznai, “‘A Bird is Known by its Feathers’ – On the Importance and Complexities of Definitions in Legislation,” *The Theory and Practice of Legislation* 2, no. 2 (2014): 160.

²² *Ibid.*, 146.

When interpreting what discrimination “because of sex” means and to whom these protections extend, “for decades, courts and federal agencies have relied upon a blend of plain language statutory construction, congressional intent, and so-called common sense”.²³ This has especially been the case when determining whether individuals who appeared to flout norms concerning gender presentation are protected. The issue of ‘sex-stereotyping’, believing an individual should present or act in a particular way as a result of their sex, was at the crux of these cases. The *Price Waterhouse v. Hopkins* (1989) decision has been noted as a crucial turning and reference point concerning the definition of sex discrimination. This case did not involve a transgender claimant, but a cisgender woman who was discriminated against and subject to disparate treatment as a result of her gender presentation not conforming to stereotypes about how a person of her sex should act or present.²⁴ The Supreme Court decided that the choice not to consider Hopkins for partnership as a result of her being too ‘macho’ and masculine, was sex-stereotyping. The court stated: “[a]s for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group”.²⁵ Thus, for the first time, discrimination against an individual, where they experience disparate treatment as a result of not conforming to stereotypes based on their sex, was deemed sex discrimination.

Although Hopkins was not transgender, her case appeared to open a narrow door increasing the likelihood of transgender people subject to disparate treatment winning their cases on the grounds of sex discrimination on the basis of being subject to sex-stereotyping. In *Smith v. City of Salem* (2004), the U.S. Court of Appeals for the Sixth Circuit found that

²³ Lisa Banks and Hannah Alejandro, “Changing Definitions of Sex under Title VII,” *ABA Journal of Labor & Employment Law* 32, no. 1 (2016): 1.

²⁴ Disparate treatment is defined as: when *an individual* is treated differently from others, based on a protected factor(s) and the different treatment is *intentional*. In this case, the protected factor would be sex.

²⁵ Legal Information Institute, “Price Waterhouse, Petitioner v. Ann B. Hopkins,” *Cornell Law School*, <https://www.law.cornell.edu/supremecourt/text/490/228>.

the sex-stereotyping present in *Price Waterhouse v. Hopkins* was also evident in this case. The Court stated “that the sex stereotyping of a female senior manager as too ‘macho’ was directly analogous to the stereotyping of a firefighter as too ‘feminine’.”²⁶ Smith had been working as a lieutenant in the Salem Fire Department in Ohio, and had done so for seven years without incident before her attempted dismissal by the Fire Department. After coming to terms with her gender identity and recognising herself to be transsexual, Smith began to present more femininely in appearance on a full-time basis. This was in accordance with the requirements and international medical protocols for transgender people who wish to medically transition. It was after this change in Smith’s presentation that she began to be at the receiving end of comments from colleagues and co-workers that her appearance and mannerisms were not masculine enough. This led to Smith notifying her immediate supervisor of her intent to medically transition. Smith’s bosses and supervisors then met and began planning how to use Smith’s transsexual status and its “manifestations” as a basis for terminating her employment.²⁷ Smith filed suit in the federal district court, asserting Title VII claims of sex discrimination and retaliation, but the court dismissed the federal claims, holding that: 1) Smith failed to state a claim of sex stereotyping; 2) Title VII protection on the basis of sex does not cover transsexual or transgender people; 3) Smith had failed to demonstrate that she had received adverse employment action as a result of sex-stereotyping.²⁸ The U.S. Court of Appeals for the Sixth Circuit overturned these decisions made by the U.S. District Court for the Northern District of Ohio. The Court of Appeals believed that “as the Supreme Court had established that Title VII’s reference to sex encompassed both biological and stereotypical differences,” in *Price Waterhouse v. Hopkins*

²⁶ U.S. Court of Appeals for the Sixth Circuit, “Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004),” *Justia US Law*, August 5, 2004, <https://law.justia.com/cases/federal/appellate-courts/F3/378/566/592872/>.

²⁷ *Ibid.*

²⁸ *Ibid.*

that the sex-stereotyping in *Smith v. City of Salem* was “impermissible under Title VII,” and thus Title VII protected Smith.²⁹

Similarly, in *Glenn v. Brumby* (2011) the Circuit Judge used the Supreme Court’s *Price Waterhouse v. Hopkins* decision to highlight that discrimination on the basis of gender and sex stereotypes is sex-based discrimination because gender and sex stereotypes are based on presumptions about how a person should act or present based on their sex. Therefore discrimination against transgender people is also sex-based discrimination. The Judge observed that by definition transgender people’s behaviour transgresses gender and sex stereotypes, as to be transgender means one’s gender does not align with the one that they were assigned at birth as a result of their sex. Thus,

[t]here is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms . . . Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex *or* gender (emphasis added).³⁰

In the Consent Decree of *Jane Doe, et al., v. Anoka-Hennepin School* (2012), the claim was made by the plaintiff that the defendants violated federal prohibitions against sex-based harassment under Title IX. The U.S. District Court of Minnesota’s definition of ‘sex-based harassment’ includes “both sexual harassment and gender-based harassment.”³¹ The Court defined ‘gender-based harassment’:

‘Gender-based harassment’ means non-sexual harassment of a person because of the person’s sex, including harassment based upon gender identity and expression. Gender-based harassment includes, but is not limited to, harassment based on the person’s nonconformity with gender stereotypes, regardless of the actual or perceived sex, gender identity, or sexual orientation of the harasser or

²⁹ Ibid.

³⁰ Ibid.

³¹ U.S. Department of Education, “Consent Decree: *Jane Doe, et al., v. Anoka-Hennepin School District No. 11, et al.*,” *Office for Civil Rights*, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/05115901-d.pdf>.

target of the harassment.³²

This definition of gender-based harassment protects those whose gender presentation and/or gender identity does not conform to stereotypes associated with their sex. In this way, the court argued that gender-based discrimination is sex-based discrimination as the recipient was harassed as a result of their sex not aligning with certain stereotypes. Anoka-Hennepin School consequently had to revise their policies and procedures to reflect this, and the student plaintiffs received \$270,000 in settlement claims.³³

The Resolution Agreement between the Tehachapi Unified School District No.11 (2011), and the Obama administration's Department of Education and Department of Justice, provides similar definitions about what constitutes 'sex-based harassment' and who is thus protected under Title IX. The Agreement defines 'sex-based harassment' to include "both sexual harassment and gender-based harassment."³⁴ The term 'gender-based harassment' is defined as "non-sexual harassment of a person because of the person's sex and/or gender, including, but not limited to, harassment based on the person's nonconformity with gender stereotypes."³⁵ The Agreement allowed Title IX to be enforced, concluding that gender-based harassment was sex discrimination as it was discrimination based on a person's gender presentation being incongruent with stereotypes associated with their sex. A revision of the Tehachapi School District's policies and regulations to include these definitions of sex-based harassment and gender-based harassment was required.

However, examples of disputes concerning the scope of sex-based protections where 'congressional intent' has been used as the foremost reasoning behind making a decision,

³² Ibid.

³³ Ibid., 49.

³⁴ U.S. Department of Education, "Resolution Agreement: Tehachapi Unified School District, the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights Division," *Office for Civil Rights*, 2018, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/09111031-b.pdf>.

³⁵ Ibid.

highlight instances where on the ‘basis of sex’ has not been defined or understood to include sex-stereotyping or gender-based harassment. Such decisions have resulted in a lack of protection for people whose gender presentation or identity does not align with gendered expectations of their perceived sex. It is these outcomes that the Trump administration has deemed ‘ordinary’ bringing them to the fore and misleadingly presenting an uncontested consistency concerning sex being defined as binary. This action by the Trump administration sows the seeds of nostalgia for those who seek such stability around biological sex and identity now. In the case of *Sommers v. Budget Marketing, Inc* (1982), Audra Sommers was fired “because she misrepresented herself as an anatomical female when she applied for the job.”³⁶ Her employers stated that her ‘misrepresentation’ allegedly “led to a disruption of the company’s work routine in that a number of female employees indicated they would quit if Sommers were permitted to use the restroom facilities assigned to female personnel.”³⁷ The Circuit Judge ruled that Sommers’ dismissal did not violate Title VII, and thus did not constitute sex discrimination. The reasoning behind this decision was: “the Court does not believe that Congress intended by its laws prohibiting sex discrimination to require the courts to ignore anatomical classification and determine a person's sex according to the psychological makeup of that individual.”³⁸

In *Ulane v. Eastern Airlines, Inc.*, (1984) this same reasoning was used by the Seventh Circuit Court to reverse the Federal District Court decision that Karen Ulane’s firing from Eastern Airlines after her transition violated Title VII. The Federal District Court had stated that Ulane had been discriminated against in a way that violated the Title both as a woman and a transsexual. However the Seventh Circuit stated that “while it does not condone

³⁶ U.S. Court of Appeals, Eighth Circuit, “Audra Sommers, a/k/a Timothy Kevin Cornish, Appellant, v. Budget Marketing, Inc., Appellee. No. 81-1754,” 667 F. 2d 748, 1982, https://scholar.google.com/scholar_case?case=18194700646711031617&hl=en&as_sdt=4006&as_vis=1.

³⁷ Ibid.

³⁸ Ibid.

discrimination in any form, it must hold that Title VII does not protect transsexuals... it is a maxim of statutory conclusion that, unless otherwise defined, words should be given their ordinary, common meaning.”³⁹ In this case, the common meaning of the Title was declared by the judge as follows:

The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder . . . a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born.⁴⁰

The outcomes in *Ulane v. Eastern Airlines*, and *Sommers v. Budget Marketing* emphasise that when sex was written into discrimination law, it was seemingly understood to be biologically binary and fixed at birth. These cases thus strengthen the Trump administration’s argument that sex within these Titles should continue to be understood this way.

As previously highlighted, maintaining consistency is considered a staple aspect of providing definitions in law. Interpreting sex how Congress ostensibly meant it can be seen as an extension of maintaining this consistency. Conversely, the interpretation of sex in *Price Waterhouse* and (re)evaluating the scope of ‘the basis of sex’ within both Titles presents a shift in the focus of sex discrimination. This shift is one that underscores the relationship between sex and culture, by exploring the stereotypes associated with sex. A need for maintaining consistency and interpreting biological sex to be binary and immutable proved vital to those opposed to the Obama administration’s significant guidance. The preliminary injunction order issued to temporarily block the guidance noted, whereas the defendants [the Obama administration] “refer to a person’s sex based on the sex assigned to them at birth and

³⁹ U.S. Court of Appeals, Seventh Circuit, “Karen Frances Ulane, Plaintiff-Appellee, v. Eastern Airlines, Inc., a Delaware corporation, Defendant-Appellant. No. 84-1431,” 742 F. 2d 1081, 1984, https://scholar.google.com/scholar_case?case=2720815591438522387&hl=en&as_sdt=4006&as_vis=1.

⁴⁰ Ibid.

reflected on their birth certificate or based on ‘gender identity’ which is ‘an individual’s internal sense of gender’,” the plaintiffs [the states opposed to the guidance] “refer to a person’s ‘biological sex’ when discussing the differences between males and females”.⁴¹ Throughout the injunction the plaintiffs make their argument based on their belief that sex “means the biological differences between a male and female”, and thus that “[a]s a physiologically-grounded regulation, it covers every human being and therefore all those within the reach of Title IX.”⁴² The plaintiffs regarded the Obama administration’s interpretation of sex to contradict the definition of sex intended by Congress in 1972, “that women receive the same opportunities as men,” and that the “two sexes are not fungible.”⁴³ The Court ultimately agreed with the plaintiffs, as they ostensibly provided a “comprehensive list of various definitions from the 1970s which demonstrated ‘during that time period, virtually every dictionary definition of ‘sex’ referred to the physiological distinctions between males and females, particularly with respect to their reproductive functions.’”⁴⁴

Yet the biology of sex is more complex than the presumed understanding of sex by Congress in 1964 and 1972 suggests. Further still, such complexity and variance has been known and made available since before the Titles were drafted. In 1955 John Money, Joan G. Hampson and John L. Hampson published ‘An Examination of Some Basic Sexual Concepts: The Evidence of Human Hermaphroditism’. This publication noted the multiple physiological facets that constitute biological sex, and sex’s un-binary nature. The publication noted that there are six variables of sex.⁴⁵ Five of these variables are biological components of the human body, which when taken holistically lead to the sixth variable –

⁴¹ Office of General Counsel, “Texas v. U.S.: Preliminary Injunction Order,” *The Catholic University of America*, 2016, <http://counsel.cua.edu/res/docs/Texas-v-US.pdf>.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ John Money, Joan G. Hampson and John L. Hampson, “An Examination of Some Basic Sexual Concepts: The Evidence of Human Hermaphroditism,” *Bulletin of the Johns Hopkins Hospital* 97, (1955): 303.

‘assigned sex and sex of rearing’. The five biological variables listed are: ‘chromosomal sex,’ different combinations of sex chromosomes; ‘gonadal sex,’ the existence of ovaries and testicles; ‘hormonal sex,’ the production of sex hormones; ‘internal accessory reproductive structures,’ the uterus and the prostate; and ‘external genital morphology,’ the appearance of external genitalia.⁴⁶ Gonadal sex is separate from hormonal sex because not all ovaries produce oestrogens, and not all testicles produce androgens.⁴⁷ These researchers found that a number of people have what they deemed ‘sexual incongruities’ which involve “contradictions, singly or in combination,” between the six variables.⁴⁸ It is fundamental to recognise that ‘incongruities’ and ‘contradictions’ are only so when compared to the constructed dichotomy of ‘male’ and ‘female’ sex where all the variables that constitute one’s sex align. Without this dichotomy all humans can be seen to have naturally occurring body variations that include a variety of sex variables of different combinations.

Unfortunately as a result of the assertion that those whose sex variations fall outside of the binary, intersex people, are ‘atypical’, their bodies are often medically forced to subscribe to the binary. By the middle of the twentieth century, the birth of intersex individuals was declared a medical and social emergency that required treatment.⁴⁹ John Money’s research with his associates was and is still being used as a means to evaluate how to operate on intersex individuals. Money stressed the importance of thorough assessments of intersex people. Once the etiology of the intersex nature of the individual was identified intervention possibilities could be assessed. The “intervention most congruent with anticipated physical developments in puberty and adulthood” could then be carried out by a surgeon in order to assign the individual with a binary sex.⁵⁰ Such coercive surgical

⁴⁶ Ibid., 305.

⁴⁷ Ibid., 306.

⁴⁸ Ibid., 306.

⁴⁹ Katrina Karkazis, *Fixing Sex: Intersex, Medical Authority, and Lived Experience* (Durham: Duke University Press, 2008): 7.

⁵⁰ Ibid.

intervention on intersex people is known as ‘corrective sex surgery’, and is commonly practiced without consent on intersex infants and also later in an intersex person’s life. Corrective surgery is however medically unnecessary, and has caused intersex people a significant amount of harm.⁵¹ Sex’s variation, the ability for certain sex characteristics to be changed and altered, and that internal sex variables do not always align with a person’s external genitalia is evident through Money’s work. His research thus highlights that before the Titles were introduced by Congress, the knowledge that sex is not binary and immutable was not only evident but acted upon. It becomes clear that there has been a continual effort to impose a sex binary on bodies through the medicalisation of sex and within society through the law. Investigating why there appears to be such a need for this binary is imperative to understanding how the idea that biological sex is binary and fixed is enforced and reified, withstanding cultural shifts in understandings of sex.

The existence of biological sex variation immediately brings the idea of sex as binary and fixed into turmoil. Furthermore, as the ‘fundamental difference(s)’ between the sexes is increasingly being challenged, the question of how to police and govern sex presents itself. This is especially the case as the construction of the gender binary and its function as a tool to regulate sex is likewise becoming increasingly vulnerable within Western culture. Gender as a non-binary concept has a long history outside of Western culture, with various groups in indigenous cultures having more genders than just man and woman. An example of this is the Hijra in South Asian culture, who are considered to be a separate gender from male or female.⁵² Although within Western culture, binary notions of gender have been used in the past to justify surgeries on intersex babies as a means of “normalizing, disciplining, and governing sex,” gender is becoming increasingly recognised as being a concept that is learned

⁵¹ Suzanne J. Kessler, *Lessons from the Intersexed* (New Jersey: Rutgers University Press, 2002): 53.

⁵² Matthew Stief, “The Sexual Orientation and Gender Presentation of Hijra, Kothi and Panthi in Mumbai, India,” *Archives of Sexual Behavior* 46, no. 1 (2017): 74.

postnatally.⁵³ Moreover, there has been increased visibility and representation within Western culture of people whose gender identity falls outside of the gender binary. Thus the utility of gender as a tool to regulate sex appears to be waning.

In order to establish where the sex and gender binary originated and how they are so global, decolonial feminist thinkers have done expansive research into their own historicities, finding the binaries to have been introduced as a project of Western Colonialism.⁵⁴ María Lugones highlights that the sex and gender binaries are a direct consequence of the West enforcing their systems of ‘civility’, which “inherently underpinned the polarization of bodies and monopolization of material and epistemic productions of the peoples.”⁵⁵ Colonialism imposed binaries through its violent installation of institutions. These institutions upheld a binary organisation of society and values where hegemonic masculinity was the main beneficiary, such as armies, corporations, capital and labour markets. These impositions were made without any regard for the existing cultures or structures of the people whose homes and land were being invaded and overturned, whether binaries existed in these societies or not.⁵⁶ In her research on women in the Yoruba culture in western Nigeria, Oyèrónké Oyewúmí notes that those who through a sex-binary lens would be considered a woman, were only defined as such after the colonial turn.⁵⁷ The men at the forefront of colonisation and the hegemonic masculinity that they embodied and enacted has been characterised by Joan Acker as ‘masculinities of empire’.⁵⁸ These masculinities presented the colonising men

⁵³ Jemima Repo, *The Biopolitics of Gender* (Oxford: Oxford Scholarship Online, 2015), 3.

⁵⁴ Ece Canli, “Binary by Design: Unfolding Corporeal Segregation at the Intersection of Gender, Identity and Materiality,” *The Design Journal* 21, no. 5 (2018): 653.

⁵⁵ *Ibid.*, 654.

⁵⁶ Joan Acker, “Gender, Capitalism and Globalization,” *Critical Sociology* 30, no. 1 (2004): 24.

⁵⁷ Canli, “Binary by Design,” 655.

⁵⁸ Acker, “Gender, Capitalism and Globalization,” 29.

as more “manly” and “virile”, legitimating violence in the interests of empire.⁵⁹ The sex and gender binary is a form of such violence.

Within theories of governance and power both gender and sex function as biopolitics, instruments of biopower. Biopower is the mechanism through which the government governs bodies and populations in a neoliberal age, in which state intervention in individual’s lives is deemed undesirable – laissez-faire. It is through biopolitics that the government is able to carry out the regulation of the population, or as put forward by Foucault, “‘biopolitics’ in turn refers to a set of strategies, techniques, knowledges, and regulatory discourses deployed to regulate life”.⁶⁰ At the end of the Cold War, whilst the government turned its attentions to “economic and political policies and ideologies favouring corporatism, privatization of public enterprises, and the reduction of state power and intervention”, it still needed a means to make sure that the population was managed.⁶¹ The government needed a way to manage the population and their life processes “in order to regulate an economically efficient and biologically re/productive and healthy population.”⁶² Gender and sex thus functioned as a means to regulate processes such as fertility, health, and marriage, which as they affect population, also affect capital accumulation. As gender and sex were framed as natural and immutable elements of an individual’s being, the population were able to regulate themselves and others through them. They could look to the binary frameworks of sex and gender to find out what it told them about themselves, how they could conform to such a reading, and how others could be read as conforming or deviating from sex and gender norms. The population now had a blueprint for how they should present themselves, reproduce, and ultimately ‘be’. Jefferey Weeks has noted that:

⁵⁹ Ibid.

⁶⁰ Repo, *The Biopolitics of Gender*, 13.

⁶¹ Patricia Ventura, *Neoliberal Culture: Living with American Neoliberalism* (New York: Routledge, 2016), 8.

⁶² Repo, *The Biopolitics of Gender*, 14.

Many of us in the West like to say who we are by telling of our sex... It places us securely in recognized discourses, embodying assumptions, beliefs, practices and codes of behavior . . . The binary divisions that many of us in Western countries take for granted, between men and women, heterosexual and homosexual, normal and perverse, provide barriers against, in the words of Epstein and Straub (1991, p.14), ‘the uncontrollable elasticity and terrifying lack of boundaries within or between bodies’.⁶³

As people are becoming more aware of intersex and transgender people, whether it be through their increasing visibility and (re)presentation within politics, mass media, social media, or academia, people are being confronted with new ways to conceptualise their own being. This is the case because “[w]hen the stakes are high, as they always are in disputes over sexual identity, we particularly expect, indeed demand, clear-cut answers-for always implicated in the question ‘Who or what is s/he?’ is the question ‘Who or what am I?’”⁶⁴ These questions about one’s identity often unsettle and provoke fear and emotional responses from the individual now questioning themselves, what they know, and how they have been governed, as what they knew to be fact and fixed becomes unstable. Both the Obama and the Trump administrations’ issuing of memorandums and significant guidance are attempts to get the governance and policing of sex back in hand. The Trump administration’s continual attempts to roll back transgender people’s rights become increasingly worrisome in this light.

In an attempt to regain stability amongst the population and keep the sex binary intact, the Trump administration have proposed and attempted to carry out a number of anti-transgender measures. These measures concern transgender people’s health and safety, and directly impacts their ability to transition by bringing their sex into contention. On July 26, 2017, President Trump announced on Twitter that transgender people were now banned from serving in the military. Trump stated that the reason for this ban was because “American

⁶³ Jeffrey Weeks, *Invented Moralities: sexual values in an age of uncertainty* (Cambridge: Polity Press, 1995), 88-89.

⁶⁴ Katherine M. Franke, “The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender,” *University of Pennsylvania Law Review* 144, no. 1 (1995): 51.

forces could not afford the ‘tremendous medical costs and disruption’ of transgender service members.”⁶⁵ The announcement of this ban appeared to be a resolution for brewing tensions surrounding whether gender transition and hormone services for transgender people in the forces should be paid for with taxpayer money. These tensions “threatened to kill a \$790 billion defense and security spending package scheduled for a vote... But rather than addressing that narrow issue, Mr. Trump opted to upend the entire policy on transgender service members.”⁶⁶ According to a Pentagon commissioned 2016 RAND Corporation study, “allowing transgender people to serve openly in the military would ‘have minimal impact on readiness and health care costs’.” The study estimated that “health care costs would rise \$2.4 million to \$8.4 million a year, representing an infinitesimal 0.4 to 0.13 percent increase in spending” as at the time of the study there were only 2,000 to 11,000 active transgender troops out of 1.3 million active members of the military.⁶⁷ Despite supposedly having “great respect” for the LGBT+ community, Trump’s false presentation of a transgender person’s desire for gender-affirming services as a financial burden so great that they must be expelled from the military cannot be seen as simply a fiscal choice.⁶⁸ Rather it presents transgender healthcare as non-essential and too expensive to be important. Transgender people’s wellbeing and the steps that they may take to improve it render them disposable and a burden to the country.

Such financial diligence however is respected both as an aspect of hegemonic masculinity in a neo-liberal age, and as fitting of a leader of a nation who can establish and assert America’s financial superiority. This is especially enticing for those who unhappily

⁶⁵ Julie Hirschfeld Davis and Helene Cooper, “Trump Says Transgender People Will Not Be Allowed in the Military,” *The New York Times*, July 26, 2017. <https://www.nytimes.com/2017/07/26/us/politics/trump-transgender-military.html>.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Helene Cooper, “Trump Says Transgender Ban Is a ‘Great Favor’ for the Military,” *The New York Times*, August 10, 2017, <https://www.nytimes.com/2017/08/10/us/politics/trump-transgender-military.html>.

feel as though the white cis straight man's social status is declining. President Trump is an embodiment of what *The Economist* has called the 'Davos Man', the seemingly "rational economic man gone global," where rational equates to prioritising capital.⁶⁹ This economic man symbolises a "hegemonic hyper-masculinity that is aggressive, ruthless, competitive, and adversarial."⁷⁰ Such masculinity which champions the ethos of the free market, competition and a 'win or die' environment is a quality that President Trump has deemed essential to "enabling the USA to lead the world".⁷¹ Trump asserts that in order to re-obtain "American Greatness" and the country's now-vanished status as "the leader of the free and unfree world," the U.S. needs a strong leader to manage it like a company.⁷² According to Trump, America

needs someone with common sense and business acumen, someone who can truly lead America back to what has made us great in the past. We need someone with a proven track record in business who understands greatness, someone who can rally us to the standard of excellence we once epitomized and explain what needs to be done.⁷³

President Trump believed that he was that person and as a result people would flock to him: "I'm not bragging when I say that I'm a winner. I have experience in winning. That's what we call leadership. That means that people will follow me and be inspired by what I do. How do I know? I've been a leader my whole life."⁷⁴ Presenting himself as a successful business-driven leader, and by promising to address the economic circumstances in struggling white communities, Trump gained strong support from counties with relatively high unemployment rates and where people faced economic hardships in his race to become the Republican

⁶⁹ Acker, "Gender, Capitalism and Globalization," 30.

⁷⁰ Ibid.

⁷¹ Christian Fuchs, *Digital Demagogue: Authoritarian Capitalism in the Age of Trump and Twitter* (London: Pluto Press, 2018), 169.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid.

candidate.⁷⁵ President Trump continues to present himself as a staunch businessman with ‘America’s’ interests at heart. His declaration of these interests being of an economic nature resonates with white cis straight men in the U.S. especially. President Trump’s portrayal of transgender people’s rights and healthcare as too costly for the taxpayer reveals these rights to be at odds with the country’s greatness. Consequently President Trump’s supporters are more likely to support anti-transgender policies as they have been provided with a seemingly rational reason for such discrimination.

The notion of making America great again, particularly through economic means, struck a chord with those who felt that previous leaders had lost sight of America’s needs as a nation, pulling the country into “a kind of cultural malaise that manifests itself through political correctness”.⁷⁶ The belief amongst Republican voters that economic needs and restoring the U.S. to its ‘former glory’ should be addressed was felt with such force that it interestingly overshadowed the fact that Trump “put noticeably little effort into branding himself as a religious candidate”.⁷⁷ With more than one-third of registered Republican voters identifying as ‘born-again’ or ‘fundamentalist’ Christians in 2016, an analytic report on the role of faith and voting found that “more than half of American adults say they would be less likely to vote for a hypothetical presidential candidate who does not believe in God.” In this light Trump receiving significant backing from religious groups and voters highlights how Trump’s ideology of making the nation great again, especially through economic means was a priority for Republican voters.⁷⁸ Additionally President Trump’s voters were in states where “the traditional ‘male as breadwinner’ family prevailed.”⁷⁹ His appeal in these areas is rooted “at the intersection of economics and what his supporters thought about gender, religion, and

⁷⁵ McVeigh and Estep, *The Politics of Losing*, 107.

⁷⁶ Cindy Jung, “The Trump Exception: Christian Morals and the Presidency,” *Harvard International Review* 37, no. 4 (2016): 9.

⁷⁷ *Ibid.*, 7.

⁷⁸ *Ibid.*

⁷⁹ McVeigh and Estep, *The Politics of Losing*, 107.

race.”⁸⁰ The Trump administration’s incessant drive to define sex as binary and immutable is therefore an attempt by the administration to cement religious support as well as increase support from those with normative gender values. The Trump administration are aware that their voters are more inclined to believe biological sex to be fixed and binary, and have felt that their economic interests have been pushed aside for LGBT+ rights. Thus by referring to previous legal cases in history where binary sex has been emphasised, and by exaggerating the economic benefits of denying transgender rights, the sex binary is presented to voters as an ideology that needs to be preserved for their benefit.

The Trump administration’s attempt to secure religious support is apparent through their presentation of the sex binary as a moral issue of religious freedom. On June 12, 2020, The Trump administration announced their finalisation of the regulation proposed in 2018 by the Department of Health and Human Services. Their proposal effectively defined transgender and intersex people out of existence. The regulation erases protections for such patients who experience discrimination from doctors, hospitals and health insurance companies.⁸¹ This finalisation comes after The Department of Health and Human Services attempted to issue a rule that would “provide additional ‘conscience’ protections for health care workers with religious or moral objections to certain types of care.”⁸² Such religious and moral objections have typically been asserted when health or business practitioners interact with LGBT+ individuals. Mr. Severino claimed that the move to finalise this exclusionary regulation “was ‘equivalent to housekeeping,’ and that the federal government was ‘updating’ their books ‘to reflect the legal reality’ that sex discrimination language does not explicitly refer to the legal status of transgender people.”⁸³ Mr. Severino’s presentation of this rule as

⁸⁰ Ibid.

⁸¹ Margot Sanger-Katz and Noah Weiland, “Trump Administration Erases Transgender Civil Rights Protections in Health Care,” *The New York Times*, June 12, 2020, <https://www.nytimes.com/2020/06/12/us/politics/trump-transgender-rights.html>.

⁸² Ibid.

⁸³ Ibid.

one that is *updating* biological sex suggests that it is in keeping with a modern time. However it is actually reinforcing how biological sex has been defined in the past, as made evident in the previous examination of legal cases concerning the definition of sex. Such phrasing reinforces the sex binary and the idea that sex is immutable, as well as presenting the ‘past’ as the ‘correct’ way to approach sex in healthcare. In a seemingly empty gesture, Severino remarked that healthcare providers and services were still allowed to embrace their own policies in regards to gender identity, but that addendum did not extend to policies surrounding biological sex. Severino’s reasoning for this echoed that of those in the aforementioned cases that “it’s not the role of the federal bureaucrat to impose their own meanings on the words that their representatives have enshrined into law”.⁸⁴

The Trump administration are and have been sowing the seeds of nostalgia concerning biological sex by presenting their definition of sex as one of Congressional intent, denying evidence of sex variation, and by presenting the sex binary as economically and morally beneficial to their voters. This has proved to be a strong unifying tactic across President Trump’s religious, non-religious and white cis straight men voters. However the administration is coming up against friction even from Republicans. On June 15, 2020, the Supreme Court ruled that Title VII protects transgender people and gay people from discrimination in the workplace.⁸⁵ This 6-to-3 ruling coming from a predominantly conservative court was a surprise to many. This was especially the case as President Trump’s first appointment to the court, Justice John G. Roberts Jr, was part of the majority. This landmark decision was made a mere three days after the Trump administration’s regulation denying transgender and intersex people healthcare protections. Consequently, on August 17,

⁸⁴ Ibid.

⁸⁵ Adam Liptak, “Civil Rights Law Protects Gay and Transgender Workers, Supreme Court Rules,” *The New York Times*, June 15, 2020, <https://www.nytimes.com/2020/06/15/us/gay-transgender-workers-supreme-court.html>.

2020, Judge Frederic Block of the United States District Court in Brooklyn blocked the administration's regulation believing it to be incompatible with the Supreme Court ruling. Judge Block stated: "When the Supreme Court announces a major decision, it seems a sensible thing to pause and reflect on the decision's impact... Since H.H.S. has been unwilling to take that path voluntarily, the court now imposes it."⁸⁶ These major decisions demonstrate that despite the Trump administration's desire to define sex as binary and immutable within laws and regulations, and deny transgender and intersex people rights, there is still a cultural shift occurring as the constructed origins of biological sex is slowly coming to light. As this light is increasingly shed and people's understanding of themselves and the 'ordinary' potentially becomes unstable, the anxiety produced and exhibited by the population needs to be investigated.

⁸⁶ Margot Sanger-Katz and Noah Weiland, "'Judge Blocks Trump Officials' Attempt to End Transgender Health Protections," *The New York Times*, August 17, 2020, <https://www.nytimes.com/2020/08/17/us/politics/trump-court-transgender-rights.html>.

Chapter Two

The Private Penetrating the Public: A Sex[ual organs] Panic

The belief that sex is biologically binary and immutable is a powerful current driving what has been labelled ‘the bathroom debate’. This controversy has become increasingly prevalent in political, cultural and mainstream media discourse, resurfacing over the course of the past decade with the increasingly visible discussion of LGBT+ rights. In 2017, sixteen states considered legislation that would mean individuals would have to use the bathroom that corresponds with the sex that they were assigned at birth.¹ Heightened levels of perturbation have led to increased surveillance within the public bathroom and locker room setting by the users of these facilities, staff within schools and public authority figures within businesses. Consequently, representations of the debate typically revolve around the question of public bathroom, shower and locker room access and whether transgender individuals should be allowed to use the facilities that correspond with their gender identity as opposed to their ‘biological’ sex. However, an analysis of the discussions of two ‘bathroom bills’, North Carolina’s House Bill 2 (HB2) and California’s Assembly Bill 1266 (AB1266), reveals that framing the bathroom debate as a trans issue is limiting. As the focus within the bathroom debate is often on the safety and privacy rights of cisgender women and children, the discrimination against transgender people, and the understanding of gender as an oppressive force, the bathroom bills uncover how the claim that sex is binary and immutable assists the moral construction of the human body. How this, alongside the spreading of misinformation and the manipulation of nostalgia which pervades current American understandings of

¹These states are: Alabama, Arkansas, Illinois, Kansas, Kentucky, Minnesota, Missouri, Montana, New York, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington and Wyoming. Joellen Kralik, ‘Bathroom Bill’ Legislative Tracking,” *National Conference of State Legislatures*, 2019, <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx>.

gender, sex, and anxieties surrounding bathroom access, translates into the restriction of bodily autonomy and the production of legitimate bodies within the bathroom bill discussions consequently gets overlooked.

These two bills specifically are useful to examine the bathroom debate due to their conception and reception. Although the bathroom debate is considered to have come to the fore during the years of 2016 and 2017, the California bill's emergence and the subsequent debate surrounding it in 2013 highlights that the bathroom debate was an issue before recent years. With California typically seen as more progressive with LGBT+ rights than North Carolina, and with San Francisco Bay often considered the international centre of the gay experience and 'the world's gay mecca', the amount of resistance that AB1266 faced is surprising. Similarly, the response to HB2 in North Carolina was one of immense backlash that it sent cultural and economic shockwaves throughout the state. HB2 being drafted several years after AB1266 additionally signifies that despite there being previous examples of bathroom bills, their outcomes and repercussions, HB2 embodies the culmination of the debate's momentum, with its supposed resolution also receiving a mixed response.

HB2 was drafted in response to the Charlotte City Council's amendment of their ordinance concerning non-discrimination in places of public accommodations to include gender identity, gender expression, marital status, familial status and sexual orientation, in addition to race, colour, religion and national origin on February 22, 2016.² Under this ordinance, transgender people would have been allowed to use restrooms, locker rooms, and other changing facilities in accordance with their gender identity. The ordinance did not require the elimination of sex-segregated facilities, or the provision of new or special facilities. Businesses and schools were additionally not obliged to modify existing sex-

² Emily A. Kunze, "Resolution of the Charlotte City Council," *Resolution Book 47*, (2016): 782, <https://charlottenc.gov/newsroom/releases/Documents/Resolution%20and%20NDO%2012-19-16.pdf>.

segregated facilities, except with the intent of accommodating the privacy of the users.

Proponents of HB2 sought to prohibit this ordinance and the changes it proposed at state level, with a bill framed as a means to ensure the protection of all people, including citizens of North Carolina and visitors to the state, emphasising the protection of cisgender women and children. HB2 required public schools and public businesses to enforce that use of sex-segregated multiple occupancy bathroom and changing facilities was to be based on “a person’s biological sex, as stated on that person’s birth certificate.”³ The bill also explicitly stated that it “supersedes and pre-empts any local ordinance, regulation, resolution, or policy that regulates or imposes any requirements on employers pertaining to regulation of discriminatory practices in employment”, and “any requirements pertaining to regulation of discriminatory practices in a place of public accommodation.”⁴ HB2 effectively rendered non-discrimination ordinances proposed by city councils null and void in the effort to create a state non-discrimination law. This law listed race, religion, colour, national origin and biological sex as protected characteristics, excluding the characteristics proposed by Charlotte City Council which notably included gender identity, gender expression and sexual orientation. It was passed on March 23, 2016.

In contrast, AB1266 sought to amend Section 221.5 of the Education Code relating to pupil’s rights concerning sex-segregated school programmes and activities such as sports and athletic programmes, as well as clarifying which bathroom and locker room facilities students could use. Existing law at the time of the bill’s proposal already prohibited public schools from discriminating against students on the basis of specified characteristics, including

³ Kara McCraw, “House Bill 2: Public Facilities Privacy & Security Act,” *2016-2017 General Assembly*, March 23, 2016, secs. 1.1, 1.2, 1.3.

⁴ *Ibid.*, sec 3.1.

gender, gender identity and gender expression.⁵ AB1266 sought to specify that such non-discrimination extended to allowing transgender students both to participate in sex-segregated activities and to use facilities that align with their gender identity, as a number of schools prohibited transgender students from doing so. Those in favour of this bill argued that it was about protecting trans students and extending their civil rights in order to make sure that all students were treated equally. The bill passed on August 12, 2013, and the backlash was palpable. The Privacy for All Students Coalition launched a referendum campaign to repeal AB1266 and “give voters the right to decide whether to accept legislation that gives students the ability to utilize intimate school facilities such as showers, rest rooms and locker rooms based on their so-called gender identity and not their actual sex.”⁶ *Privacy for All Students* included a number of anti-LGBT+ religious-right organisations, non-profit organisations and faith groups such as the Capitol Resource Institute, the Pacific Justice Institute, Faith and Public Policy, Calvary Chapel Chino Hills, and ActRight, as well as parents and students. The coalition gathered over 600,000 signatures, however not all of the signatures were valid and *Privacy for All Students* thus failed to qualify for an initiative that year. However, the same groups of organisations reconvened in 2015 in a second attempt to repeal AB1266 under a new title for their coalition: *Privacy For All*. The coalition filed the *Personal Privacy Protection Act* which was later renamed *Limits on the Use of Facilities in Government Facilities and Business*.⁷ Under this Act, people who felt that their privacy in the bathroom had been violated by a transgender individual would have the right to sue for at least \$4,000.

⁵ Secretary of State, “Assembly Bill No. 1266: Chapter 85: An act to amend Section 221.5 of the Education Code, relating to pupil rights,” *California Legislative Information*, 2013-2014, https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1266.

⁶ Karen England, “Privacy for All Students Coalition Launches Referendum Campaign to Let Voters Decide Fate of School Bathroom and Shower Legislation,” *Christian News Wire*, August 26, 2013, <http://www.christiannewswire.com/news/915172673.html>.

⁷ Autumn Sandeen, “Privacy For All Announces Bathroom Bounty Bill Initiative Signature Drive,” *The Trans Advocate*, July 16, 2015, https://www.transadvocate.com/privacy-for-all-announces-bathroom-bounty-bill-initiative-signature-drive_n_15263.htm.

This initiative needed about 140,000 less signatures than the previous effort, and had twice the number of days to gather these signatures. However, the initiative failed again.

Interestingly, HB2 similarly received a significant amount of backlash upon its passing. The bill was dubbed North Carolina's "sweeping anti-LGBTQ law," sparking outrage amongst LGBT+ people, their allies, and businesses across the nation.⁸ Protests ensued; companies such as PayPal and Deutsche Bank abandoned their plans to expand into the state, and released statements condemning the law along with companies such as American Airlines and Apple.⁹ By April 1, 2016, 140 major CEOs and business leaders signed an opened letter asking Governor McCrory to repeal the law.¹⁰ Both the NBA and the NCAA pulled sports events from the state, the NCAA stating that they were considering doing so for six years if the bill was not repealed. Music boycotts occurred in response to the bill as artists such as Bruce Springsteen, Ringo Starr, and the band Pearl Jam cancelled their concerts within the state. Other musicians such as Cyndi Lauper, Mumford & Sons, and Laura Jane Grace used their concerts in the state as a platform to criticise the bill, raise money for groups and organisations fighting against it, and advocated for its repeal.¹¹ According to an Associated Press analysis, HB2 was estimated to cost North Carolina over \$3.76 billion over a twelve-year period. However, after being in place for a year, the bill was eventually repealed on March 30, 2017 and replaced with HB142. Despite this, LGBT+ people and their allies were still dissatisfied as although the new bill repealed HB2, state

⁸ German Lopez, "HB2, North Carolina's sweeping anti-LGBTQ law, explained," *Vox*, March 30, 2017, <https://www.vox.com/2016/2/23/11100552/charlotte-north-carolina-lgbtq-pat-mccrory>.

⁹ Motoko Rich, "North Carolina Gay Bias Law Draws a Sharp Backlash," *The New York Times*, March 24, 2016, <https://www.nytimes.com/2016/03/25/us/north-carolina-law-antidiscrimination-pat-mccrory.html>.

¹⁰ Human Rights Campaign Staff, "Pressure Builds in North Carolina As More Executives from Major Companies Call for Repeal of HB 2," *Human Rights Campaign News*, April 21, 2016, <https://www.hrc.org/press-releases/pressure-builds-in-north-carolina-as-more-executives-from-major-companies-c>.

¹¹ Daniel Kreps, "Pearl Jam Cancel Raleigh Concert to Oppose 'Bathroom Bill'," *Rolling Stone*, April 18, 2016, <https://www.rollingstone.com/music/music-news/pearl-jam-cancel-raleigh-concert-to-oppose-bathroom-bill-39517/>.

agencies, boards, offices, departments, institutions, branches of state government, and local boards of education were pre-empted from regulation of access to multiple occupancy bathrooms, showers and locker rooms. This meant that they could not pass transgender-inclusive policies unless they received permission from the North Carolina General Assembly. HB142 additionally stated that “no local government in this State may enact or amend an ordinance regulating private employment practices or regulating public accommodations” until December 1, 2020.¹² Consequently, cities cannot pass any local LGBT+ non-discrimination ordinances during this time, leaving LGBT+ citizens of North Carolina without public accommodations protections. As a result of this bill still being perceived as anti-LGBT+, the economic backlash of both HB2 and HB142 can still be felt today. For example, as recently as January of this year, Netflix opted out of filming the drama ‘OBX’ in North Carolina despite the series being set there, and instead chose to film in South Carolina.¹³

The analysis of the North Carolina House Representatives Floor Session debate on HB2 and the AB1266 Full Senate Education Committee Testimony offer a useful study highlighting the contrasting benefits and pitfalls of framing the bathroom debate as a transgender issue. In HB2, the arguments against the sex-integration of bathrooms, showers and locker rooms that were framed as an issue of cisgender women and children’s safety defeated arguments stating that not allowing people to use the facilities that corresponded with their gender identity was discrimination against transgender people. In the AB1266 discussion, the opposite was the case. In both discussions, the arguments concerning sex-integration in these bathroom bills are constructed as a transgender issue. Examining the

¹² Philip E. Berger, Tim Moore and Roy Cooper, “Session Law 2017-4: House Bill 142,” *General Assembly of North Carolina*, March 30, 2017, sec. 3, <https://www.ncleg.net/Sessions/2017/Bills/House/HTML/H142v5.html>.

¹³ Bryn Elise Sandberg, “Netflix Won’t Film TV Show in North Carolina Due to State’s Anti-LGBTQ Law,” *The Hollywood Reporter*, January 10, 2019, <https://www.hollywoodreporter.com/live-feed/netflix-wont-film-tv-show-north-carolina-due-states-anti-lgbtq-law-1175306>.

components of the arguments in the discussions of the bills illuminates how the false belief that sex is binary and immutable is entrenched within the cultural imaginary, and how this belief is manipulated to fashion a collective nostalgia that sanctions cisgender gender conforming bodies and discards all others. Significantly, in the AB1266 discussion, the local community were able to voice their testimonies and the perspective of a transgender person was asserted, whereas in the HB2 floor session the State Senate were actively making decisions that overturned policy that the local community had put in place through city government.

Although North Carolina and California are considered Republican and Democratic states respectively, there are similarities in the arguments of both sides of the debates. In the HB2 debate and the AB1266 hearing, the belief that the separation of bathrooms, locker rooms and activities according to the sex binary is ‘common sense’ is put forward as one of the main arguments against sex-integration. In the HB2 debate, Representative Arp states that the separation of “biological men” from “women’s bathrooms, showers or locker rooms” is “just common sense,” and allowing sex-integration “strip[s] all North Carolina citizens of their right to privacy”.¹⁴ Arp explicitly defines such privacy as “the right to use restrooms, [and] changing areas, without regular exposure to viewers of the opposite [*sic*] sex”.¹⁵ These statements by Arp suggest that in the bathroom, showers and locker room, privacy is specifically maintained through the separation of differing sex organs, and that people of one sex actively observe people of another sex when they are in the same space. This concept is similarly present in a statement given in the AB1266 hearing by Ben Lopez, the chief lobbyist and spokesman for the Traditional Values Coalition. Lopez states that a bill requiring

¹⁴ Brad Worley, “Transcript of the Proceedings: Floor Session, Debate on House Bill 2,” *North Carolina General Assembly: North Carolina House of Representatives*, March 23, 2016, 48-49, <https://www.ncleg.gov/sessions/2015e2/HB2Transcripts/HouseFloorDebate.pdf>.

¹⁵ *Ibid.*, 47.

sex-integration has “complete disregard” for privacy.¹⁶ He proceeds to describe such privacy as the “reasonable expectations” of students and parents “that they will not be forced to share intimate spaces with members of the opposite biological and anatomical gender. There are no safeguards.”¹⁷ Both debates highlight two reasons that sex-segregation ostensibly pertains to ‘common sense’: 1) that sex-segregation is imperative to both protecting individuals’ privacy concerns, and the safety of cisgender women and children; and 2) sex-segregation aligns with common perceptions around what sex is and has always been: that the sex assigned to an individual at birth is fixed and is either ‘male’ or ‘female’. These seemingly self-evident common-sense assumptions mutually reinforce one another and are particularly damaging and lasting when presented as a product of reason, as they erase the complexity and fluidity of sex and gender, thus erasing the experiences of transgender and intersex people.

As the use of bathrooms, showers, and locker rooms often requires individuals to uncover body parts, either in the process of undressing, changing, showering or defecating, accordingly genitalia is often exposed in these spaces. In such areas where people come into contact with their own genitalia, the bathroom, shower room and locker room become spaces rife with anxieties. The loss of and disregard for privacy that Arp and Lopez believe to occur in this instance is explained by Talia Mae Bettcher through her distinction of what she calls the “*morally* and *materially* private.”¹⁸ Bettcher uses these terms to explain how the social possibilities of being dressed and naked, particularly in Eurocentered culture, are tied to issues of morality, privacy, decency, and violation, and how they are used to delineate boundaries between men and women. Whether a body part is materially private concerns whether it is covered and concealed from sight, whereas the morally private refers to the fact

¹⁶ Senate Education Committee Testimony, “Hearings on AB1266,” *California Legislature on The School Success and Opportunity Act*, June 12, 2013, 14:40, <https://www.youtube.com/watch?v=PIiG0qCYRfI&list=WL&index=7&t=0s>.

¹⁷ Ibid.

¹⁸ Talia Mae Bettcher, “Full-Frontal Morality: The Naked Truth about Gender,” *Hypatia* 27, no. 2 (2012): 322.

that different body parts have varying moral status. In order to determine whether a body part is morally private, one can typically look at the social consequences (which are often unspoken) of exhibiting this body part, for instance “because of the moral consequences of displaying one’s privates, one conceals them in public.”¹⁹ This highlights that the morally private invokes moral and physical boundaries. These boundaries are not limited to one individual’s body, but become shared once the body comes into contact with another. Moral lines are drawn between people and can be overstepped. This can occur if a person looks at another’s privates without their consent, if there is an oversharing of personal information by an individual, and if too much of one’s body has been revealed to another individual.²⁰ Arp presents a theoretical scenario before the North Carolina Senate to highlight a potential occurrence of the traversal of moral boundaries between people of different sexes in the same space. Arp states:

Summer’s coming... Emily and Ashante, seven-year-old girls, are so excited to go to the pool. Their mother’s taking them to the pool. They go into the locker rooms. They’re bouncing off the walls with excitement... ‘All right, girls. Calm down. Go ahead and take off your clothes and get your bathing suits and we will go to the pool.’ As they begin to do so, in walks a biological male. Sits down on the wooden bench in front of the lockers right beside them and begins to disrobe. What just happened? Emily, Ashante and her mother just lost their privacy.²¹

This analogy presented by Arp suggests that the presence of a “biological male” disrobing in the same space that young girls and mothers disrobe strips the children and their mother of their privacy. This implies that the presence of a ‘male body’ in the presence of ‘female bodies’ particularly whilst in a state of undress, crosses moral boundaries, as body parts that have greater moral privacy and thus have higher boundaries concerning visual access are on display. The mother and children have had visual access to a ‘male body’, and a man has had visual access to their ‘female bodies’. As Eurocentered cultural ideology has a history of

¹⁹ Ibid.

²⁰ Ibid., 323.

²¹ Worley, “Transcript of the Proceedings,” 46-47.

socially sanctioning women's bodies, nakedness; and actions concerning decency, sex and intimacy, "a woman can be violated either through seeing or being seen by a man," consequently losing their privacy when exposed to a "biological male."²² Thus sex-segregation in spaces where the morally private is exposed is argued for as a means of establishing 'privacy and decency' boundaries to demarcate bathrooms, locker rooms and showers as (heterosexual) sex-free and thus spaces with moral integrity.

Anxieties concerning the sex-integration of bathroom and locker room spaces are exacerbated by fears surrounding heteronormativity. It is through heteronormativity that heterosexuality, the notion of 'opposite-sex' relationships, is normalised and presented as the dominant and standard sexuality. Sex-segregated spaces ostensibly separate these sexes, whereas the sex-integration of bathrooms, showers, and locker rooms would involve the exposure of genitalia within those spaces that are seen as 'compatible' according to the conventions of heteronormative sex. This results in these spaces being seen as a potential site of sexual practice in the cultural imaginary. The idea of a place where strangers converge being a place where sex also materialises causes anxieties concerning the extreme possibilities of sex, such as sexual violence, to arise. This is amplified within the discussions of the bathroom bills as they concern children having access to these spaces. The discussions emphasise a safety risk that not only threatens children, but also cisgender women, who are deemed the next most vulnerable to sexual violence. This is because "rape is canonically conceptualized 'male-to-female.'" One reason for this concerns the conceptualisation of male genitalia as violating and female genitalia as violated."²³ The phrase 'male genitalia' is typically code for a penis and associated with 'men', and 'female genitalia' is code for a vagina, usually associated with 'women'.

²² Bettcher, "Full-Frontal Morality," 328.

²³ Ibid., 326.

In HB2 and AB1266, the risk of potential predators and perverts frequenting bathrooms, showers and locker rooms to violate women and children is presented as a reason against sex-integration. In the bill discussions, the perceived risk of sexual assault is overtly stated. For example, this risk is seen as particularly prevalent as a result of AB1266 and a provision within the HB2 bill allowing transgender people to use the bathrooms, showers and locker rooms that align with their gender identity. In HB2, Representative Richardson presents her concern that as a result of transgender women being allowed to use the women's bathroom as long as their birth certificate is changed to reflect their womanhood, "then those, quote, 'perverts' that we are saying would raid our women's bathroom, and go in and hurt our children, what's to stop them from changing their birth certificate?"²⁴ Representative Mcelraft echoes this sentiment, reflecting on a friend's reservations about visiting Charlotte due to their fears of the consequences of sex-integration. She states:

This is about protecting, not from a transgender [*sic*], necessarily, but from a predator, who had the authority then, as a man, to go in a young woman's dressing room in high school, or a – a women's bathroom... I had a friend who just travelled through Charlotte. They said they were afraid for their child to go into the restroom – a teenager – because they didn't know if the law in Charlotte had already changed.²⁵

Sheila Jeffreys writes about the 'upskirting phenomenon' which involves "the practice of photographing up women's skirts without their knowledge," emphasising that some of the culprits include "men who dress in women's clothes".²⁶ Jeffreys cites a blog that documented a listing of arrests of "male-bodied persons who have harassed or assaulted women in women's toilets in the last few years whilst wearing clothing they associate with women".²⁷ Unfortunately the site no longer exists, and Jeffreys notes that "it is not possible to know whether these are men [*sic*] who consider that they are transsexual or transgender, or just men

²⁴ Worley, "Transcript of the Proceedings," 93.

²⁵ *Ibid.*, 114.

²⁶ Sheila Jeffreys, "The politics of the toilet: a feminist response to the campaign to 'degender' a woman's space," *Women's Studies International Forum* 45, (2014): 48-49.

²⁷ *Ibid.*, 49.

who are adopting women's clothing in order to facilitate their access to women and children". However, this website's previous existence and Jeffreys' concern highlights that the fear of predators and perverts masquerading as transgender women frequenting bathrooms, showers and locker room space is a concern shared by others.

In order to prevent such masquerading from happening, both Ben Lopez and Representative Richardson in AB1266 and HB2 respectively call for the additional policing of transgender people and their bathroom access as a form of safeguarding the bathroom, shower and locker rooms. The premise behind this proposal is that if it is harder for people to legally affirm their transgender status, then it would theoretically be harder for cisgender people to impersonate a transgender person and less likely that they would go to such efforts. In AB1266 Lopez remarks that the California Interscholastic Federation (CIF) has:

greater teeth and requirements in their requirements than this bill or current law has with respect to documenting what is perceived legitimate gender identity... The CIF regulations require specific items to be met. Out of a category they have to list or meet three standards in order to be classified as ... legitimately having a gender identity issue or expression issue on hand.²⁸

CIF guidelines require that once a school has notified CIF of an athlete's desire to participate in activities in accordance with their gender identity, the student has to prepare for an appeal hearing before a CIF Gender Identity eligibility committee. This committee consists of at least three people within the following list, one of which is obliged to be a physician or have a mental health background; a physician with experience in gender identity health care and the World Professional Association for Transgender Health (WPATH) Standards of Care; a psychiatrist, psychologist or licensed mental health professional familiar with the WPATH Standards of Care; a school administrator from a non-appealing school; a CIF staff member;

²⁸ Senate Education Committee Testimony, "Hearings on AB1266," 14:40.

and an advocate familiar with Gender Identity and Expression issues.²⁹ The athlete is then additionally expected to bring to the appeal and present to the committee; a current transcript and school registration information; and documentation of their consistent gender identification which can be from the student, their parent or guardian, or a health care provider.³⁰ In order to find out whether transgender people have to go through a procedure of legally legitimising their gender identity to access certain facilities in a similar vein, Richardson asks whether “there is any requirements for someone changing their birth certificate, or will schools monitor that birth certificate? Or how will we know that I didn’t just change my birth certificate because I wanted to go in the girls’ bathroom?” At the time, in order for a person to change the sex marker on their birth certificate according to the North Carolina General Statute,

A written request from an individual is received by the State Registrar to change the sex on that individual's birth record because of sex reassignment surgery, if the request is accompanied by a notarized statement from the physician who performed the sex reassignment surgery or from a physician licensed to practice medicine who has examined the individual and can certify that the person has undergone sex reassignment surgery.³¹

If a predator was seeking to change their gender marker on their birth certificate just to gain access to certain spaces, they would have to go through the already extensive process of having sex-reassignment surgery that has been certified by a physician, in order to sustain such a masquerade.³²

Although in both debates transgender women were said to not necessarily be the people who children and women are at risk from, their sanctioning is deemed appropriate in

²⁹ California Interscholastic Federation, “Guidelines for Gender Identity Participation,” *Governance Constitution*, 2018, http://www.cifstate.org/governance/constitution/Guidelines_for_Gender_Identity_Participation.pdf.

³⁰ *Ibid.*

³¹ Lambda Legal, “Changing Birth Certificate Sex Designations: State-by-state guidelines,” *Lambda Legal*, September 17, 2018, <https://www.lambdalegal.org/know-your-rights/article/trans-changing-birth-certificate-sex-designations>.

³² Worley, “Transcript of the Proceedings,” 6.

order to, as Matthew McReynolds a staff attorney at the Civic Justice Institute in California put it in the AB1266 discussion, “take account of the 99% or more of the other students in our school system and their privacy concerns.”³³ Prioritising the “majority of students” whose personal relationship with gender and their sex falls in line with heteronormative and cisnormative views by policing the minority is presented as the best way to “accommodate” and “act in a way that is in the best interests of all students.”³⁴

As a result of a majority of people being cisgender, cisnormative and heteronormative, ideas about gender and sex have become common perceptions. These perceptions are presented in both debates as ‘common sense’, while views that do not align with such common sense are presented as unnecessarily and unhelpfully tangled. Consequently, sex-segregation is seen as logical and congruent with the views held by most people. In the HB2 debate, Representative Bishop informs the Senate of what the HB2 bill states that biological sex is. He expounds that sex is binary: “biological sex, the sections both state, is the physical condition of being male or female, which is stated on a person’s birth certificate.”³⁵ Additionally, Bishop points out that a person who undergoes complete sex-reassignment surgery can amend their birth certificate “as to the gender”. This distinct use of the word gender, as opposed to sex, implies that although a person has undergone sex re-assignment surgery so that their gender can be affirmed, their sex is unchanged. It is this definition of sex that Bishop refers to when he describes sex as “what everybody’s always understood that it means”.³⁶ On the contrary, this notion appears to be in flux. As completion of sex re-assignment surgery involves altering an individual’s genitalia, and since there is

³³ Senate Education Committee Testimony, “Hearings on AB1266,” 11:25.

³⁴ Ibid.

³⁵ Worley, “Transcript of the Proceedings,” 6.

³⁶ Ibid., 128.

only a single marker on the birth certificate for sex/gender, sex becomes at least legally mutable, although genitalia as the sole indicator of sex is reinforced.

Alternative definitions of sex have subsumed gender identity as evidenced in the Dear Colleague Letter on Transgender Students from the Obama administration in relation to Title IX. The request that a person's gender identity be treated as their sex as proposed in the Letter, which would instigate sex-integration, is not a definition that the proponents of HB2 and those opposed to AB1266 could approve of. In AB1266, George Riley, a student and a parent at the hearing, expressed his concern that the bill did not solidly clarify "what it is to be male or female" as it did not define it adequately.³⁷ Ben Lopez echoes a similar sentiment stating that "the problem is that this bill nor current law for that matter affords a clear definition as to what constitutes legitimate gender identity and gender expression."³⁸ This lack of a consensus concerning the definition of a concept considered to be an essential aspect of people's identity, causes how one conceptualises themselves to become fraught with anxieties, particularly if their sense of self has become fractured as a result of (re)positioning themselves through the lens of another's oppression. As a result, stability is sought after as one feels nostalgic, longing for when this now unstable aspect of their identity was once scientific fact. As it is the 'majority' of people whose concept of self is reshaped if the sex-binary becomes insecure, reinforcing that binary appears to be a shared beneficial goal. Thus the false belief that sex is binary and immutable is perpetuated, fashioning a collective nostalgia that solidifies their identity and elevates their status.

With the increase in visibility of various minority groups and the analysis of their intersectional marginalisation, there has been a proliferation in terminology to address the experiences that these groups undergo. This upsurge in narratives of identity politics has

³⁷ Senate Education Committee Testimony, "Hearings on AB1266," 20:55.

³⁸ Ibid., 14:40.

resulted in a pushback against marginalised groups, both in regard to the perceived legitimacy of their experiences, and the language used to describe their experiences. Nancy Fraser notes that even the term ‘identity politics’ has become “increasingly used as a derogatory synonym for feminism, anti-racism, and anti-heterosexism.”³⁹ The expansion of vocabulary and jargon concerning gender identity has those who refuse to see how their status is (re)positioned when confronted with the oppression of others juxtaposed against their own privilege, harking back to simpler times when conceptions of self seemed less complex, holding on to their own outlook in order to avoid the uncanny. McReynolds’ statement that AB1266 “takes us further down the road of gender identity in a way that we think is fundamentally inconsistent with the views of most Californians ... that are certainly common sense,” re-invokes the idea of an imagined less complex past, where definitions were singular, logical and fixed.⁴⁰

Proponents of AB1266 and those opposed to HB2 attempt to counter the claim that transgender bathroom access threatens the safety of cisgender women and children, simultaneously dispelling the transphobic myth that sex-integration encourages predators. Additionally, the discrimination that transgender people face within society and the centring of transgender people’s experiences and their right to a good quality of life and education is presented as the main argument for the sex-integration of bathrooms, locker rooms, shower facilities, and sex-segregated activities such as sports. In both discussions, examples of places that have implemented sex-integration policies are given, in order to demonstrate that sex-integration does not pose a safety risk. In AB1266, Judy Chairson from the Los Angeles Unified School District addresses her school’s approach to sex-integration. She recounts that although she and other teachers at first had their concerns and worries with letting students

³⁹ Nancy Fraser, *Justice Interruptus: Critical Reflections on the ‘Postsocialist’ Condition* (New York: Routledge, 1997), 113.

⁴⁰ Senate Education Committee Testimony, “Hearings on AB1266,” 11:25.

participate in activities and use the facilities that were consistent with their gender identity, “ultimately we decided that we as the adults needed to manage our fears and give students the respect and dignity that they deserved.”⁴¹ After implementing the policy she declares, “none of our fears have been materialised,” and that “in the eight years that we’ve had our policy, we’ve not had any problems. On the contrary it has solved many problems. It’s a non-issue on our campuses.”⁴² As opposed to finding incidents of predatory behaviour or sexual violence, the teachers found that all of their students including their transgender students “use the bathrooms for the same reasons... to do their business, fix their hair and makeup, and gossip with friends.”⁴³ In HB2, Representative Alexander conveys the same message. Drawing on the knowledge that his fellow House members are family oriented, as many members on both sides of the debate expressed their parenthood status, Alexander dwells on the gender-neutral bathrooms at the popular family vacation sites Disney World Orlando and Universal Studios Orlando. These accessible bathrooms are called companion restrooms, or family restrooms; a spacious single room with a toilet and sink. As both of these family resort locations have an abundance of children and adults frequenting their grounds - Disney World having an average of 52 million visitors annually - Alexander makes the point that the sex-integration of public facilities “is not really new ground that is being plowed”.⁴⁴ He remarks on the unfounded nature of the anxieties concerning safety as a result of sex-integration when he states:

I don’t know how many of you may have traveled down to the state of Florida and have gone to Disney World or Universal Studios... And I don’t think any of you had any problems when you went to the toilets down there. Or any of your constituents have reported predators lurking around Shamu’s Pool. You know, it just hasn’t been an issue ... nothing like what we’ve been hearing in this debate, from some quarters, has ever happened.⁴⁵

⁴¹ Ibid., 02:36.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Worley, “Transcript of the Proceedings,” 70.

⁴⁵ Ibid., 69-70.

Correspondingly, the claim that upon the sex-integration of bathrooms, showers and locker rooms the sexual predator will run rampant is deemed a myth constructed as a fear-mongering tactic. In the HB2 debate, the proponents of the bill argue that sex-segregation is needed in order to prevent sexual predators gaining unwarranted access to places in which they do not belong. Representative Harrison, however, counters this, noting that “there are already laws against sexual predators. It’s a ruse to state otherwise.”⁴⁶ According to North Carolinian General Statutes, Chapter 14 Article 22B, an individual attempting to gain access to a bathroom, shower or locker room that has signage indicating that they should not be in that space, and remains there without authorisation would fall under a second degree trespass as defined in section two: “§ 14-159.13. Second degree trespass. (a) Offense. – A person commits the offense of second degree trespass if, without authorization, he enters or remains on premises of another:... (2) That are posted, in a manner reasonably likely to come to the attention of intruders, with notice not to enter the premises.”⁴⁷ Therefore a sexual predator entering a bathroom that has signage conflicting with their own sex was already a chargeable offence before the proposal of HB2, rendering that supposed aim of HB2 insignificant, suggesting that the bill was being presented on false pretences.

Building on this, Representative Hall claims that HB2 was ultimately constructed in order to improve the Republican Party’s reputation amongst voting Republicans. He comments: “You know, as Republican primary voters left the polls, they said they had a 60 percent disapproval rating for their Republican leadership. And so now we’ve created this emergency fiction, and we’re going to have an emergency solution.”⁴⁸ The concept of

⁴⁶ Ibid., 36.

⁴⁷ North Carolina General Statutes, “Chapter 14 – Criminal Law. Article 22B – First and Second Degree Trespass. Section 14-159.13 – 13. Second degree trespass,” *Justia US Law*, 2013, <https://law.justia.com/codes/north-carolina/2013/chapter-14/article-22b/section-14-159.13/>.

⁴⁸ Worley, “Transcript of the Proceedings,” 104.

creating an emergency fiction in order to valiantly provide an emergency solution falls in line with Roger N. Lancaster's theorisation of the cultivation of moral panics, specifically sex panics. He writes that the self-styled leaders of the solution, - "moral entrepreneurs" – "convince others that containment, punishment, banishment, or destruction of the person or persons designated as scapegoat will set things right."⁴⁹ In both debates, the scapegoat presented is transgender people, particularly transgender women, as disallowing or policing their entrance into the bathroom, restroom or locker room that aligns with their gender identity is seen to be the solution deemed necessary in order to prevent the threat of sexual predators and to protect 'the majority' of people who are cisgender.

Since the threat that the moral panic is based on concerns sexual violence, and the act of coitus is associated with genitalia, consequently there is a conflation of transgender women with sexual predators within the HB2 debate and the AB1266 discussion. This is a consequence of binary understandings of sex marking genitalia as *the* indicator of biological sex. As previously stated, the penis is associated with men, and thus people who have a penis are considered to be 'male-bodied'. Transgender women are often labelled as male-bodied by those who believe sex to be binary and immutable. This ideology regards transgender women's sex to be 'male' regardless of whether they have undergone sex re-assignment surgery. Despite the absence of a penis in some cases, transgender women are still regarded as men because of their supposedly immutable 'maleness', which constitutes them as a threat.

In AB1266, the male-bodied individual is presented as a threat in a personal anecdote given by a student at Sacramental City College called Sarah Joseph. She recalls her experience of being in a locker room with two other women when a person that she believed to be a man walked in. She states that upon finishing her shower,

⁴⁹ Roger N. Lancaster, *Sex Panic and the Punitive State* (California: University of California Press, 2011), 24.

I was the first one to see him. He was not there to take a shower. He was not there to use the bathroom... He was just sitting there observing. I don't know whether he took pictures, and umm, one young lady could not get dressed because he was seated on the bench where her clothes were. I proceeded to get dressed. She stayed close to me because she was scared, she didn't know what his intentions were.⁵⁰

It is clear from this story that the women in the locker room felt vulnerable in the presence of and under the gaze of this person they perceived as male-bodied. Upon reporting this incident to the police, Joseph was asked whether the person was transgender. In response to this question Joseph stated: "I said 'I don't know.' I didn't ask him, nor did he volunteer the information. He was just sitting there observing. Anyone can walk into that area, and claim to be a transsexual, doesn't matter." Joseph proceeds to explicitly state her fears: "There is no concern here for the safety of children... What do you say to a child who's been molested to take a shower with a male? And then she gets upset and you tell her 'well, get over it, it's your fault, you're going to get hit with a hate crime.'" Joseph's phrasing of her worries regarding a male-bodied person having access to locker room spaces where children are present can be interpreted in two ways. The first interpretation is that the presence of a male-bodied person can be an emotional trigger for people who have been molested. The second interpretation is that a child *is* molested by being in the bathroom, shower or locker room space with a male-bodied person. These harmful acts for Joseph are exacerbated by the fact that such male-bodied people could be transgender, or masquerade as transgender and therefore cannot be criticised, highlighting the conflation of transgender people with sexual predators. This is evocative of the transphobic rhetoric of Janice Raymond's *The Transsexual Empire* where she labels transgender women rapists by virtue of being 'deceivers'. She writes:

Rape, of course, is a masculinist violation of bodily integrity... Rape, although it is usually done by force, can also be accomplished by deception. It is significant that in the case of the transexually constructed lesbian-feminist, often he is able to

⁵⁰ Senate Education Committee Testimony, "Hearings on AB1266," 18:30.

gain entrance and a dominant position in women's spaces because the women involved do not know he is a transsexual and he just does not happen to mention it.⁵¹

This construction of male-bodied people, but specifically transgender women, as a symbol of rape and sexual violence fuels the image of the threatening transgender woman, made a scapegoat as she “embod[ies] the moral threat” of sex-integration and thus needs to be impeded so that the threat cannot materialise.⁵²

The portrayal of transgender women, especially those with penises, as a sexual threat is reminiscent of how the construction of the Black man as a sexual predator was used to uphold the racial segregation of facilities including bathrooms in accordance with Jim Crow. Jim Crow refers to “the period between 1876 and 1965 during which laws backing practices of racial segregation were enacted in the U.S.”⁵³ As a result Black people were “vulnerable to insult, discrimination, and economic subordination.”⁵⁴ A “cultural fantasy of a black threat to white femininity”, a fantasy that specifically frames “black manhood in a criminal proximity to white women” was concocted by white segregationists to justify their discrimination. These segregationists argued that “a [white] man would be horrified at the idea of his wife or daughter seated by the side of a burly negro in the parlor of a hotel or at a restaurant” and “cannot see her occupying a crowded seat in a car next to a negro without the same feeling of disgust,” and so train cars had to be racially segregated with their own bathroom facilities.⁵⁵ Similarly, in 1926 in Alabama, the courts determined that there was an “unwritten covenant” which conveyed that apartments should not be rented to Black people in the same building as

⁵¹ Janice Raymond, “Sappho by Surgery: The transsexually constructed lesbian-feminist,” in *The Transgender Studies Reader*, ed. Susan Stryker and Stephen Whittle (New York: Routledge, 2006), 131-143.

⁵² Roger N. Lancaster, *Sex panic and the punitive state* (Berkeley: University of California Press, 2011), 14.

⁵³ Michael Ra-Shon Hall, “The negro traveller’s guide to a Jim Crow South: negotiating racialized landscapes during a dark period in United States cultural history, 1936-1967,” *Postcolonial Studies* 17, no. 3 (2014): 308.

⁵⁴ Ibid.

⁵⁵ Elizabeth Abel, *Signs of the Times: The Visual Politics of Jim Crow* (California: University of California Press, 2010), 131.

white people.⁵⁶ When this social agreement was violated, “the court ruled that the aggrieved white occupants could sue the owner for (in effect) evicting them, and also claim damages for *mental anguish* suffered from having to share toilet facilities with nonwhites.”⁵⁷ This sentiment of white people, especially white women needing protection from Black men as a result of stereotypes surrounding ‘the Black man’s’ physicality and nature, combined with the presence of Black men evoking feelings of disgust, fear and pain from white people is similar to the presentation of transgender women as fearful and threatening because of their supposed physicality as seen in the bills debates and the myths surrounding it.

Proponents for the sex-integration of bathrooms, showers and locker rooms in both AB1266 and HB2 highlight that the scapegoating of minority groups is discriminatory. In the AB1266 discussion, Assembly member Tom Ammiano addresses the construction of transgender people as a moral threat, alluding to the history of moral panics surrounding LGBT+ individuals. He states:

I think there’s been a dehumanisation here of what transgender boys and girls are. They’re not sexual beings . . . it’s not a transgender kid is going to invade the privacy of another kind of kid – people are very respectable of each other . . . It is true that people feel uncomfortable. I know you might be shocked, but people feel uncomfortable with me when I walk into a room. That doesn’t mean that you can beat me up, that doesn’t mean you can sue me, and that doesn’t mean you can prevent me from equality in California schools. I was a school teacher for twenty eight years, an openly gay man – the suggestion of any kind of impropriety has always been one of those bigoted issues that need to be confronted and I think that the LGBT movement has done that successfully. If people are uncomfortable I can understand that, but being uncomfortable does not allow people to discriminate.

The fear-mongering that accompanies scapegoating is thus inferred by Ammiano to be a projection of people’s anxieties concerning difference. In the HB2 debate, Representative Cunningham states that there is a reluctance within both the Assembly Chamber and the state of North Carolina as a whole to react to difference with non-violence, whether it be physical

⁵⁶ Ibid., 74.

⁵⁷ Ibid. (Emphasis added).

or legislative, as “policy will not change perception. Minds will not change... still today, people’s hearts have not changed.”⁵⁸ Representative Insko suggests that this reluctance and fear stems from a lack of familiarity amongst the House with transgender people. Insko hopes that with increased public conversation concerning transgender individuals, peoples’ consciousness will be raised, and transgender people will cease to be scapegoated and discriminated against out of fear. Insko remarks:

There was a time when we didn’t know someone who is gay; now, we all know someone who is gay, and have gay friends. There was a time when we didn’t know anyone who was transgender. Someday, that will be – we’ll all be familiar with that issue, and tolerant of it. But for now, we’re really struggling.⁵⁹

In both bill discussions, the discrimination that transgender people face as a result of their difference is underscored in order to highlight that the sex-segregation of bathrooms, showers and locker rooms furthers the violence that they experience and affects the quality of their livelihood. In the AB1266 debate, Ashton Lee, a sixteen year old transgender boy from Antigua High School in California explains the double-bind that he is in as a result of sex-segregation within his school.⁶⁰ He states that the school has systematically placed him in a class of all girls and refuses to transfer him onto the gym class equivalent for boys. This class is compulsory, as he is required to attend in order to graduate, which results in him “feeling alone and devastated,” and makes it extremely hard to focus on his other classes. Consequently, he is falling behind and struggling daily.⁶¹ Similarly, in the HB2 debate, Representative Harrison expresses her sympathy with transgender constituents who are in high school. She stresses a need to focus on “the humaneness and the compassion element” of the debate.⁶² Harrison laments at the “harassment and bullying and potential harm” that might

⁵⁸ Worley, “Transcript of the Proceedings,” 116.

⁵⁹ Worley, “Transcript of the Proceedings,” 87.

⁶⁰ Senate Education Committee Testimony, “Hearings on AB1266,” 5:25.

⁶¹ Ibid.

⁶² Worley, “Transcript of the Proceedings,” 35.

come to transgender girls forced to use the boys' bathroom.⁶³ Subjecting transgender people to such harm on top of the "indignity and discrimination" that they experience on a daily basis in "everything from employment, to housing, to jobs, to restaurant access, and, yes, restroom access," could cost transgender people their lives. Remarking on the "suicide rate among transgenders [*sic*] being as high as 41 percent," Harrison believes that "you can safely say no one chooses to be transgender."⁶⁴

Statistics from the 2011 National Transgender Discrimination Survey highlight just how significantly discrimination against transgender people affects their quality of education and their quality of life. The survey found that "those who expressed a transgender identity or gender non-conformity while in grades K-12 reported alarming rates of harassment (78%), physical assault (35%) and sexual violence (12%)."⁶⁵ Nearly one-sixth (15%) of transgender and gender non-conforming people experienced harassment so severe that they had to leave school in grades K-12 or in higher education settings.⁶⁶ Additionally, "for those who had to leave school due to harassment, nearly half (48%) reported having experienced homelessness," and "more than half (51%) of respondents who were harassed, physically or sexually assaulted, or expelled because of their gender identity/expression reported having attempted suicide."⁶⁷ These statistics highlight why proponents of the sex-integration of bathrooms, locker rooms, showers and school activities argue that sex-integration is necessary in order to "guarantee transgender students have the same opportunities to participate and succeed as others," both in school and in life.⁶⁸ In AB1266, Judy Chairson reflects on a study that Los Angeles Unified School District conducted in conjunction with

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Jaime M. Grant, et al., *Injustice at every turn: A Report of the National Transgender Discrimination Survey* (Washington: National Centre for Transgender Equality, 2011), 32.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Senate Education Committee Testimony, "Hearings on AB1266," 00:26.

the Youth Risk Behaviour Survey. Chairson was shocked to find that the school district had about 3500 (0.5%) of their students who were transgender, and felt as though these students deserved to feel supported. Implementing the sex-integration of bathrooms, locker rooms, showers and sports activities is considered doing just that, providing excellent educational opportunities, and giving them dignity and respect.⁶⁹ Furthermore, in the HB2 debate, Representative Insko emphasises that the poor quality of life and education that transgender people in the city of Charlotte experience is a “local issue”, and thus something that the state needs to intervene in. She states that in comparison to more conservative cities in North Carolina, Orange County has “a lot more gay and transgender bisexual people... It’s a tolerant community, so why shouldn’t we be able to have a local ordinance that we choose, that protects the population that lives in Orange County?”⁷⁰ Just as North Carolina has “a large population of people with sickle cell disease”, and thus has state laws in place to protect these people, the city of Charlotte has “a local population that needs this protection”. Despite the unfortunate association of transgender identity with a disease, Insko nonetheless suggests that the state has a responsibility to protect its transgender population.

The arguments for the sex-integration of bathrooms, showers, locker rooms and school activities demonstrate how the belief that sex is binary and immutable is damaging for transgender people. However, it fails to highlight how both a non-complex definition of sex and the physical incorporation of such a simplistic conception of sex into a built environment harms more than just transgender people. In addition to erasing transgender people, a fixed sex binary does not account for intersex people, that is, people who are born with varying sex characteristics that do not align in a binary manner. In *Queering Bathrooms*, Cavanagh interviews Emily, an intersex person who was surgically altered at birth and given a male

⁶⁹ Ibid., 02:36.

⁷⁰ Worley, “Transcript of the Proceedings,” 87.

gender identity by the doctors who operated on her.⁷¹ In adulthood she later transitioned to reflect her female gender identity. Emily details her experiences stating that as a result of her anxieties surrounding using public bathrooms, she's deliberately "learned a certain amount of discipline" involving holding off using bathrooms outside of her home, in order to avoid the possibility of anyone reading her as a man.⁷² Emily expands on her avoidance of public bathrooms:

I've spent many a year being, unduly, I think, afraid of ... using public bathrooms. Afraid of, not necessarily ... physical threat, but sort of the emotional, social threat of being 'outed' and embarrassed and humiliated in front of people ... being stood up in front of everybody ... 'You're different and you don't belong here.'⁷³

Julie A. Greenberg notes that the omission of intersex people from bathroom debates is one that could diminish if the number of non-consensual 'corrective' sex surgeries on intersex children at birth and early in their lives lessens. If this were to occur, it would become more likely that intersex access to bathrooms, locker rooms and shower would increasingly be seen as an issue, as their sex traits and external sex indicators might not fit into a sex binary.

In addition, the sex-integration arguments put forward in the bill discussions only concerned binary transgender people. The argument for people to use the facilities and participate in activities that correspond with their gender identity, when only two options, 'male' or 'female', are provided, excludes gender-variant transgender people (i.e. those that fall outside of the binary of man and woman), whilst also being harmful for gender non-conforming cisgender and transgender people alike. E Canli notes that design and architecture "is a long-lasting colonial practice" which functions as "one of the most effective means of upholding these regimes of othering" by reproducing "bodily segregations through

⁷¹ Sheila L. Cavanagh, *Queering Bathrooms: Gender, Sexuality, and the Hygienic Imagination* (Toronto: University of Toronto Press, 2010), 56.

⁷² Ibid., 132.

⁷³ Ibid., 60.

the binary reconstructions of gender, sexuality and identity”.⁷⁴ If a person’s gender presentation aligns with the norms expected of the sex indicated by the signage on the facility, then they are likely to be easily read as a person of that sex. Judith Halberstam refers to this as the “cardinal rule of gender”, meaning that “one must be readable at a glance.”⁷⁵ Complying with gender norms makes an individual a ‘good’ public bathroom or locker room user, and thus a docile body: a ‘good’ body that conforms to the norms as dictated. These individuals do not need to be scrutinised further regarding compliance within the bathroom, because their gender is perceived to align with the expectations of the environment they are in. Thus, they are not viewed as a threat to cisgender women, children or the status quo. Other individuals are not always so fortunate. Bathroom users who transgress gender stereotypes are often subject to harassment both within and outside of the bathroom setting, which affects cisgender people whose gender presentation is regarded as unconventional, transgender people and intersex people, all in slightly different ways. As sex segregated bathrooms, showers and locker rooms act as sites where gender is tested and proved according to traditional gender stereotypes, those who pass the gender test are granted the power to evaluate others and contest others’ gender. Those who do not pass the test are deemed deviant for digressing from ‘the norm’. As a result of not conforming to the gender norms of the sex-segregated bathrooms, these people are also often deemed as not conforming to heteronormativity, amplifying their deviant status.

Consequently, the moral boundaries that constitute an individual’s privacy as argued by those against sex-integration are only in place for people whose gender presentation is read as aligning with their sex. The gender-variant person, intersex person, and cisgender gender non-conforming person become emblematic of the abject, or abject bodies, as they

⁷⁴ Canli, “Binary by Design,” 653.

⁷⁵ Judith Halberstam, *Female Masculinity* (Durham: Duke University Press, 1998), 23.

elicit a “moment of separation” and create a border between the ‘I’, the cisgender gender conforming person, and the ‘other’, the abject body. This triggers reactions of disconcertment and fear from the ‘I’ upon this comparison.⁷⁶ The bodies that are perceived to be abject are interpreted as a threat, not only to the cisgender gender conforming person’s body, as they try to deduce which bathroom the abject figure ‘belongs’ in, but also to the cisgender gender conforming person’s sense of self. As the heteronormative boundaries of the bathroom, shower, and locker room are tested, and the ideas of what people of a particular gender or sex look like are challenged, individuals are forced to view themselves on a gender and sex spectrum. They are forced to evaluate what the possibilities of these spectrums mean regarding their own gender identity and the idea of biological sex, viewing themselves in relation to others. The perpetuation of the sex binary, then, is a consequence of a nostalgia that seeks to restore a sense of order in a world where heteronormative values are becoming increasingly criticised. As the processes of urinating and defecating are natural ones that every individual has to complete, and cleanliness is deemed both moral and imperative to keeping diseases at bay, access to the bathroom, showers and locker rooms is considered fundamental. Those who have limited or no bathroom access have a lesser quality of life, and are at risk of catching health complications and illnesses. Thus, incorporating the sex binary into a structure demarcated for such essential bodily functions by physically building the sex binary into the environment, continually reinforces the idea that the cisgender gender conforming body is the standard to which all bodies are compared, constantly (re)producing (il)legitimate bodies. As a result, the gender-variant individual, the intersex individual and the cisgender gender non-conforming individual are persistently policed, their access to the bathroom, showers and locker rooms obstructed, which damages their quality of life.

⁷⁶ Iris Marion Young, *Justice and the politics of difference* (New Jersey: Princeton University Press, 1990), 143.

Chapter Three

Sisterhood, Not Cisterhood: The Wider Implications of Competing Definitions of Womanhood.

The question of what it means to be a “woman” in the feminist movement, and in particular feminist theory, is one that has long been fraught with debate and conflict. The issue is inextricably linked to the process of conceptualising gender and sex. It is well recognised that there is no monolithic ‘woman’, as each woman navigates the world differently and faces different oppressions, making their experiences of womanhood unique. In spite of this, the concept of a united womanhood and solidarity with each woman’s plight under the banner of feminism has long been troubled. The status of womanhood, which has historically been a position granted or withheld, coupled with the perception of difference as ‘threatening’ has led to exclusionary conceptions of what it means to be a woman. The question of whose experiences are recognised as legitimate and whose are not is intimately linked to biological factors and their social meaning, creating a sanctioned biology of womanhood. This sanctioned biology is dictated and ostensibly adjusted at particular points in time and culture, where who counts as a woman is determined by those women who hold the most privilege and power: white, cisgender, gender-conforming straight women ultimately become the gatekeepers of (the status of) womanhood. How nostalgia functions through the social meaning of biology to determine status of womanhood, (re)producing oppressive and exclusionary definitions and conceptions of womanhood within feminism is crucial to understanding how women have been denied womanhood status. This becomes particularly important when investigating how despite some women’s claims that biology, specifically binary sex, is an unrelinquishable factor in determining a person’s status as a woman, womanhood has not historically been granted this way. Rather biological factors are used to

discriminate and exclude women from obtaining and asserting womanhood status within feminism.

Feminist movements, groups, and philosophies have respectively sought to challenge a considerable variety of issues. The equality of women and men, campaigning for women's rights, women's autonomy, and the dismantling of patriarchal systems have all been part of feminist concerns.¹ However, underpinning them all is the idea that men have oppressed women through a socially constructed imbalance of power enforced on both a macro-level through institutions and on an inter-personal level. In order to perpetuate the subjugation of women, men have used the binary model of biological sex both as a means to oppress women and as a reason for doing so. Within the binary model of sex there exist two groups that are biologically distinct: men and women. The biological 'difference' of women is thus presented as a reason for women to be lesser and inferior than men. For instance, sex researchers and sexologists wrote analyses of men and women's bodies and attributed certain qualities to them, such as passiveness. Consequently, the constructed social meaning of a woman's biology kept her subjugated.

As a result of this socially constructed imbalance of power, feminists have fought to challenge the unequal distribution of power and acquire their own autonomy.² When addressing women's subjugation on the basis of biology, "feminists did not necessarily challenge the view that women had different qualities and characteristics from men, but used this to their advantage", depending on the statement that they were trying to make about being a woman.³ The understanding that a woman was not inherently lesser because of her biological make-up and difference was agreed upon by feminists. However, when

¹ June Hannam, *Feminism* (Abingdon: Routledge, 2014), 7.

² Ibid.

³ Ibid., 9.

campaigning for their goals, some feminists disagreed about whether women should be treated the same as men regardless of biology, or whether biological difference should in fact be emphasised. The birth of the Equal Rights Amendment (ERA), and the debates surrounding its ratification provide a useful example within feminist history where competing definitions of womanhood and an emphasis on the social meaning of biology and binary sex sustains patriarchal views of womanhood and further upholds traditional gender roles. The ERA was originally conceived in 1922 by the National Women's Party, and sought equality of rights under the law regardless of sex. After the plight for suffrage was considered completed in 1920, a division occurred over what objective women should strive towards next. Some women argued that the Party's approach to women's issues should be centred on women's rights in all areas of life, desiring equality between men and women irrespective of sex, and thus contending that the ERA should reflect that. Other women believed that such equality in all ways of life would not be beneficial for women. They believed in advancing women's interests through social measures, and that equality for women should be limited to the political and civil areas of life. Political equality was sought through state laws as opposed to federal laws. These women worried that the quest for political equality in federal laws would result in the removal of legislation that supported areas of child labour, women's labour and maternity healthcare, which were of concern to them as they held the opinion that a woman's role occupied the traditional scope of motherhood.⁴ They argued that "protective labor laws would always be needed for women, regardless of what labor laws existed for men. Without such laws, women could contract diseases and either become sterile or give birth to inferior babies", directly conflicting with their role of motherhood.⁵ They additionally believed that sociological and scientific study highlighted that "women were more subject to

⁴ Peter Geidel, "The National Woman's Party and the Origins of the Equal Rights Amendment, 1920-1923," *The Historian* 42, no. 4 (1980): 557.

⁵ Ibid.

physical, mental, and moral harm than men in industry.”⁶ These women emphasised the importance of recognising and highlighting the social meaning of their biology, stressing its perceived importance to their plight, existence and health as women.

Whilst one group of women understood the social meaning of their biology - a consequence of the binary biological sex framework - as something that needed to change, others saw it as something that needed to be protected. The former group’s campaign to be treated in the same way as men despite sex difference can be termed the ‘sameness’ approach, whilst the latter group’s campaign to emphasise (sexual) difference can be called the ‘difference’ approach. In order to garner support for protecting existing federal legislation concerning women, proponents of the ‘difference’ approach sowed seeds of fear around other women’s campaign for sameness and what it meant. They declared that the opposing group’s goal of sameness was a threat to women, blurring “any clear distinction between the sexes,” and disturbing “marriage, the family and the natural relations between men and women... the natural order of things”.⁷ This view echoes the sentiment expressed by Arabella Kenealy in *Feminism and Sex Extinction*, that treating men and woman equally in all ways despite sex differences would result in the proliferation of “mixed types”; people “more or less degenerate, structurally, functionally and mentally”, as “masculine mothers produce emasculate sons by misappropriating the life potential of male offspring.”⁸ This perspective supports the idea that the traditional concept of womanhood, which revolves around motherhood and femininity, should be desired and sustained. Equality between men and women in all ways of life is construed as unnatural, resulting in the dissolution of the sex binary which would be detrimental to women and their lives. Efforts to challenge the socially

⁶ Ibid.

⁷ Ibid., 207.

⁸ Arabella Kenealy, *Feminism and Sex-Extinction*, (T. Fisher Unwin: London, 1920), book 1, <http://www.gutenberg.org/files/37964/37964-h/37964-h.htm>.

constructed disparities through legal measures, such as the implementation of the ERA, were portrayed as having damaging material biological consequence for women due to the “blurring” of the sexes. Thus, prioritising the importance of maintaining the social meaning of women’s biology, grounded in the traditional role of women and rooted in the sex binary, led to the propagation of what would now be considered oppressive definitions of womanhood.

As a result of this division surrounding feminists’ aims within the National Women’s Party, the ERA did not reach Congress. However, its re-emergence in the 1970s and the continuing debate over the definition of womanhood within women’s rights and feminist activism in the 1970s sheds light on how maintaining the sex binary and the traditional roles of men and women is often presented as a moral issue. Mrs Phyllis Schlafly, one of the faces of the anti-ERA organising/campaigning, points out that treating men and women as though they are the same has fearful consequences. In addition to presenting the concept of sameness as a threat to not only the role of women, but future generations as well as the institution of marriage as a heterosexual affair, Schlafly presented sameness as a threat to the structure and physical manifestation of heterosexuality and sex and gender binaries. During the ratification period of the ERA, Schlafly stated that a consequence of its passage would lead to “coed bathrooms,” and eventually “coed everything – whether you like it or not.”⁹ This sentiment was one that was heavily visible within anti-ERA campaigning, in particular the campaigning carried out by religious organisations. For example, in the face of the immoral blurring of men and women, Christian religious influence, including its preoccupation with the idea of sex as binary and the subsequent personal respectability politics and models of late-Victorian sexual mores associated with it, was extremely evident during this period.

⁹ Judy Klemesrud, “Opponent of E.R.A. Confident of Its Defeat,” *The New York Times*, December 15, 1975, 53.

The organisation *Concerned Women for America* believed that God made men and women biologically different and that those biological differences made men better suited to ruling. Though political inequality would inevitably arise (and was presumably considered acceptable) from this state of affairs, they did not believe that women were made to be inferior or socially unequal. However, due to their beliefs, Concerned Women for America were convinced that the ERA had no place within the United States' rule of law, as it was perceived to clash with the ruling of men.¹⁰ The Mormon Church released an anti-ERA editorial in its *Deseret News* citing that it was "fact that men and women are different, made so by a Divine Creator," and that the ERA was "not only imperfect but dangerous" and would "work to the disadvantage of both men and women."¹¹ The Mormon Church considered the ERA to be a "moral issue," as a bid for political and constitutional protection that covered equality of the sexes "struck at the very core of Mormonism's deepest beliefs about the gender-specific roles for men and women in life."¹² This illustrates how religion was utilised as a tool to perpetuate the sex binary and claim that the biology of men and women determines what (traditionally gendered) roles they should play within society. Thus, it contributed to upholding the essential nature of sex difference in order to create a morally appropriate and divinely sanctioned definition womanhood. In contrast, there were some Christian groups who opposed this view. The Evangelical Women's Caucus understood the ERA to be necessary as "God wished for the sexes to be equal in all ways, including politically."¹³ In their opinion it was "human fallibility" that led to biblical interpretations supporting the oppression of women. Indeed, in their words, such interpretations "did not resonate with the word of God."¹⁴

¹⁰ Ibid.

¹¹ Ibid., 626-627.

¹² Ibid., 629.

¹³ Ibid.

¹⁴ Ibid.

It is vital to note that the constructed social meaning of biology which concerns and complicates definitions of womanhood is not only rooted in biological sex and an insistence on its binary nature. Considering the role that race has in determining who is deemed a woman highlights how what it means to hold womanhood status is not actually linked to biological sex or binary sex differences at all. During the enslavement of Black people in the U.S., the white public and, in particular, prominent white men such as J. Marion Sims, presented enslaved Black women as objects of fungible flesh. In order to be considered a woman and to have a gender, one had to hold a 'human' status within the culturally- and temporally-specific context. As Black slaves were not considered humans but rather property as a result of their race, such a class status disqualified Black women slaves from womanhood regardless of their biological sex. Yet, the 'ungendered' Black woman, this fungible *flesh-considered-property*, was experimented on in order to exploit their sex and reproductive potential in the name of medical developments for "real" (white) women.

The competing and conflicting knowledges concerning Black enslaved women and their sex during this period were perpetuated by the white man. First among these knowledges was that the Black woman slave was a 'hyper-fertile vessel', a role she was pushed and abused into in order to produce profit in the form of children born into slavery. Secondly, and somewhat contradictorily, Black enslaved women were also constructed as infertile, their sex needing to be fixed so that they could become a 'hyper-fertile vessel'. As Black slaves were considered property, it was deemed perfectly acceptable for white men to (ab)use their bodies however they wished. Black enslaved women were considered appropriate bodies to experiment and practice medical advancements upon with regard to biological sex. Operating on Black slaves became imperative to the development of knowledge around biological and reproductive sex to help inform the white women of her own sex and any issues that she encountered. J. Marion Sims carried out "more than three

years of experiments on named and unnamed chattel persons for the treatment of VVF [vesicovaginal fistula] [which] served as ‘proof’ of black females’ genital exceptionalism (as nonreproductive, inverted, unfeminine).¹⁵ Vesicovaginal fistula is “a breach in the vaginal wall that opens into the urinary tract and produces continuous involuntary discharge of urine.”¹⁶ As they are usually the result of a significant crush injury to the pelvis tissue, enslaved women were at increased risk of contracting VVF as a consequence of “poor nutrition, lack of prenatal care, and births at an early age.”¹⁷ Snorton expands upon how this affected Black slaves’ status as women, or lack thereof, as he explains that “the pelvis was also a critical site for producing racial hierarchies among nineteenth-century anatomists and sexologists intent on finding bodily ‘proof’ of black inferiority.”¹⁸ This demonstration of how Black women’s bodies were rendered objects and tools devoid of gender and womanhood status irrespective of their anatomy, and furthermore, how their bodies were used to bolster the ‘legitimate’ womanhood of white women, makes room for the discussion of how both sex and gender are the “transoriented effects of flesh, anarranged in time, place, and meaning.”¹⁹

Regarding the question of what defines womanhood and who is seen as a woman, the construct of race and the biology used to supplement it reveals how what Judith Butler writes about gender can be applied to sex: “The question is not: what meaning does that inscription [sex and gender] carry within it, but what cultural apparatus arranges this meeting between instrument and body.”²⁰ The question of who is dictating the social meanings of biology, and the bearing this has on definitions of womanhood, becomes fundamental in understanding who such categories serve to protect and whose womanhood is legitimised and recognised,

¹⁵ C. Riley Snorton, *Black on both sides: A racial history of trans identity* (Minnesota: University of Minnesota Press, 2017), 20.

¹⁶ *Ibid.*, 19

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*, 20.

²⁰ *Ibid.*, 52.

whose experiences validated. Even after Black people were ‘freed’ from their enslavement, the social meaning of race and ethnicity continue(d) to result in Black women’s experiences and womanhood being belittled. Black women were still presented by the white public as licentious and immoral, unworthy of having the title of ‘woman’, and threatening to white women’s social status as women.²¹ Josephine Ruffin noted in 1895 that “Year after year southern women have protested against the admission of colored women into any national organization on the ground of the immorality of these women”²² During the 1970s, the long-standing tension between Black and white feminists became exceedingly palpable as white feminists and their aims failed to account for the issues Black women faced, while Black women’s issues and their womanhood were simultaneously discredited. In *Sister Outsider*, Audre Lorde notes that within feminism “there is a pretense to a homogeneity of experience covered by the word *sisterhood* that does not in fact exist.”²³ As femininity has traditionally been defined in white European terms, Black women’s experiences have been ‘othered’ and considered ‘alien’, their struggles not included within ‘women’s struggles’. The lack of acknowledgment by white feminists even after the defeat of the ERA that race and ethnicity intersect with sex to produce a unique form of oppression for Black women has resulted in white women’s reinforcement of sexism and racism, despite supposedly fighting against the oppression of women. Lorde explains that one of the reasons behind this is that white women have been too preoccupied with the issue of sex difference and the subject of inferiority.

Lorde recognises that as a tool of patriarchal social control, women have been encouraged to only recognize biological sex as a legitimate human difference of concern. She writes that “for as long as any difference between us means one of us must be inferior, then the recognition of any difference must be fraught with guilt. To allow women of Color to step

²¹ bell hooks, *Ain't I a Woman: black woman and feminism* (Boston: South End Press, 1981), 131.

²² Ibid.

²³ Audre Lorde, *The Audre Lorde Compendium: Essays, Speeches and Journals* (London: Pandora, 1996), 164.

out of stereotypes is too guilt provoking, for it threatens the complacency of those women who view oppression only in terms of sex.”²⁴ By establishing a hierarchy of oppression in which sexism is the most oppressive force, and by declining to recognise that Black women experience oppression on more than one axis, white feminists refused to acknowledge that Black women faced discrimination that was different to their own because the social meaning of Black women’s biology was different to that of white women’s. This attempt to deny the specific oppression of Black women, erase their experiences and thus exclude them from feminism and womanhood, ironically only highlighted how biological sex is not the only axis through which oppression and discrimination can occur.

bell hooks expands on this by illustrating that since white women were seeking equality with white men by attempting to gain privileges within the white male power structure, it was ultimately “white men – and not women, either white or black – [who] have dictated the terms by which women are allowed entrance into the system.”²⁵ As the white male power structure actively oppresses Black people and Black women, any group that seeks to benefit from such a structure or curry favour from those who oppress others by conforming to their prescribed guidelines for ‘allowed’ womanhood and femininity, is a group that sustains and furthers white patriarchal oppression. White women’s attempts to emphasise sex difference as essential to determining womanhood can be seen as an attempt to gain privilege amongst white men, whilst also neglecting to recognise how race has denied Black women womanhood. Thus, through the construct of the sex binary white patriarchal oppression is able to produce and establish definitions of womanhood that ultimately harm all women.

²⁴ Ibid., 165.

²⁵ hooks, *Ain’t I a Woman*, 156.

Biological sex difference and the social meaning of a woman's sex in this binary framework has not always been the determining factor in who gets to hold the status of womanhood, as the social meaning of race has also been used to disqualify Black women from womanhood in spite of their sex. In light of this, the role of the sex binary in constructing exclusionary conceptions of womanhood and the ways in which it is able to do so in contemporary society need to be interrogated. Within feminism, the belief that biological sex is binary and immutable is a core principle for trans-exclusionary radical feminists. Their belief in a binary biological sex difference between men and women, that transgender women are not women, and that the inclusion of transgender women into womanhood harms cisgender women, is fundamental to their ideology. Sheila Jeffreys stresses that there is a blurring of the 'male' and 'female' sex by including transgender women in womanhood which puts cisgender women in danger. This idea that a blurring of the 'binary' sexes is both happening and potentially harmful to cis women is reminiscent of the argument put forward by the feminists who opposed the ERA that were discussed above. Much like Phyllis Schlafly's claims that there would be 'co-ed everything', Jeffreys writes that

the demanders [transgender women] in this instance do not claim that they are disadvantaged in their own right, but that they actually are physically members of the female sex caste, women, as in the demand by male-bodied transgenders [*sic*] that they should be able to enter spaces, such as toilets, set aside for women.²⁶

Jeffreys' bizarre conclusion is very much out of line with transgender women's emphasis on how they are oppressed as a result of transmisogyny: the distinct meeting of transphobia and misogyny. Trans women and people who are transfeminine "experience heightened ridicule, gaze and violence in comparison to trans men and transmasculine people".²⁷ The increasing

²⁶ Sheila Jeffreys, *Gender Hurts: A Feminist Analysis of the Politics of Transgenderism* (London: Routledge, 2014), 255.

²⁷ Jen Slater and Kirsty Liddiard, "Challenging Transmisogyny: Why Disability Studies Scholars Must Challenge Transmisogyny and Transphobia," *Canadian Journal of Disability Studies* 7, no. 2 (2018): 84.

rate of the deaths of Black transgender women in the U.S. is a notable demonstration of this. Furthermore, Jeffreys' emphasis on bodies and a binary, biological sex pertains to the argument against transgender women having womanhood status.

As both gender and sex are and have been historically tied to power insofar as they function as tools of oppression, and since by definition subordination is a consequence of oppressive power dynamics, emphasis on a sex binary has become significantly important for transgender-exclusionary radical feminists (TERFs). They believe that the 'male sex' are "responsible for the violation of women's rights to live," and therefore those who are presumed to be of the 'male sex' are considered to have privilege and power over women.²⁸ As they believe trans women to be of the 'male sex', they argue that trans women should not be allowed into womanhood or women's spaces because trans women are supposedly more privileged and, since men systematically oppress and inflict violence on women, that they could bring harm to cisgender women. This is because TERFs conceptualise trans women as: having certain bodily features that they associate with the male sex - such as a penis, testes, and higher levels of testosterone; and having been socialised as men, which makes them "*just* as prone to commit violence against women as cis men are."²⁹ TERFs believe that because cis men have oppressed women on the basis of biological difference, and as 'male' and 'female' are two distinct biological sexes, trans women have been socialised to oppress cis women in the same way as the male sex. However, this argument does not account for the complexities of socialisation for people whose gender does not align with the sex they were given at birth. Furthermore it ignores how people are able to resist their socialisation and the consequences of such resistance.

²⁸ Jeffreys, *Gender Hurts*, 255.

²⁹ Lorna Finlayson, Katharine Jenkins and Rosie Worsdale, "'I'm not transphobic, but...': A feminist case against the feminist case against the feminist case against the feminist case against trans inclusivity," *Verso Books*, October 17, 2018, <https://www.versobooks.com/blogs/4090-i-m-not-transphobic-but-a-feminist-case-against-the-feminist-case-against-trans-inclusivity>.

Not prescribing to the gender roles ascribed to one's sex often has severe consequences and cause one to suffer heavy policing. As Lola Olufemi notes, "daily people die because they challenge, subvert and threaten the visual script dictated by the gender binary," including "Butch women. Feminine men. Transgender men and women, non-binary people and anyone who is gender non-conforming."³⁰ In fact, trans women are particularly vulnerable to such violence and are often the targets of violent forms of gender policing, with 80 per cent of trans women killed in the U.S. as a result of gendered violence being 35 years old or younger.³¹ By presenting people of the 'male sex' as a monolithic violent group, TERFs do not account for this difference, neither do they account for the role of power dynamics in 'sex-based' oppression. Although indeed cisgender straight white men have the most power within society and thus have the ability to systematically oppress others, the power to oppress is not exclusive to this group, especially on an interpersonal level. This belief "implicitly denies that the impulse to dominate, or to use a more materialist formulation, an authoritarian response to certain conditions of life, could be a universal human characteristic that women share, even if they have mostly lacked the opportunity to exercise it."³² The systematic and interpersonal oppression that men have exercised on women and other groups is about power distribution rather than biological sex. The ideology that biological sex is binary and immutable has been provided as the justifying reason for oppression and cisgender straight white men's superiority, in a similar way that whiteness and the biology of the white person compared to that of the Black person has been used to justify white supremacy. Therefore, by insisting on a biological distinction between men and women, TERFs are reproducing the conditions under which they are being oppressed, as the sex binary has both facilitated women's oppression and been cited as its justification.

³⁰ Lola Olufemi, *Feminism Interrupted: Disrupting Power* (London: Pluto Press, 2020), 53.

³¹ Ibid.

³² Ellen Willis, "Radical Feminism and Feminist Radicalism," *Social Text*, no. 9-10 (1984): 96.

An additional argument presented by TERFs to keep trans women out of womanhood is that trans women reaffirm the gender binary which harms (cis) women. This same argument harks back to the argument used by white feminists to keep Black women out of womanhood, as “white women’s liberationists have helped to perpetuate the belief that black women would rather remain in stereotypically female roles.”³³ Trans women are presented by TERFs as a monolithic group who all transition, and desire a stereotypically feminine visage. Not only is this demonstrably not true, as not all trans women seek to medically transition or subscribe to traditional femininity, it also “ignores the fact that cis and trans women adopt stereotypical femininity for the same reason, blaming them for the gender scripts necessary for survival.”³⁴ As we have already seen, straying from gender normative presentation or roles often results in violence which disproportionately affects trans women.

Furthermore, trans women are often “actively encouraged by doctors and Gender Identity Clinics to adopt conventional femininity as a means of ‘proving’ that they are who they say they are.”³⁵ Frequently, if trans women do not follow this script, they are denied access to gender affirming services as well as healthcare and safety services. In fact, a recent memo denying trans women access to women’s shelters released by the Department of Housing and Urban Development (HUD) under the Trump administration, details how one might have grounds to question a women’s sex in order to ultimately ‘spot’ trans women and deny them this potentially life-saving service because of the physical attributes they might possess. The memo states:

It [the proposed changes] would also provide that a recipient, subrecipient, owner, operator, manager, or provider may determine an individual’s sex based on a good faith belief that an individual seeking access to the temporary, emergency shelters is not of the sex, as defined in the single-sex facility’s policy, which the facility accommodates... HUD believed that reasonable considerations may

³³ Ibid., 148.

³⁴ Olufemi, *Feminism Interrupted*, 61.

³⁵ Ibid.

include, but are not limited to a combination of factors such as height, the presence (but not the absence) of facial hair, the presence of an Adam's apple, and other physical characteristics which, when considered together, are indicative of a person's biological sex.³⁶

This memo highlights that if trans women do not remove any facial hair that they might have and, if they have one, do not minimise their Adam's apple, then they risk being denied access to shelters. Height, facial hair and an Adam's apple are thus presented as characteristics of the 'male sex', even though cis women may also be tall, have facial hair and have an Adam's apple. This endangers cis women as well, also putting them at risk of being denied access to necessary, safe shelters.

The HUD memo, in conjunction with TERFs' claims that trans women reinforce patriarchal views of womanhood and are thus harmful to cis women, emphasises a refusal to acknowledge why trans women often have to conform to a specific type of femininity; which is a result of the very same patriarchy and indicates an issue of safety. Additionally, it ignores that not all women - including cis women - conform to femininity as dictated by the gender binary, and that all women are harmed by the enforcement of this binary. Rather, it is beneficial for all women to see biological sex as a feature of the human body which exists in a limitless range of variations across all people and functions differently for each person. Biological sex is not indicative of identity and its subsequent social mores because human beings have invented and constructed sex to be so, but rather it is used to instigate and further oppression. Decolonial queer feminists have illustrated how the gender binary and the conception of biological sex as binary and immutable is a "cornerstone of Western modernity," and has functioned to gender and design bodies, in a process that involves "how identity categories and material practices have been concerted fostering social

³⁶ Office of the Secretary, Department of Housing and Urban Development, "Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs," *National Archives: Federal Register* 85, no. 143 (2020): 44816.

stratification.”³⁷ The Peruvian scholar Annibal Quijano underlined that “the sustainment of modern capitalist hegemony within the ‘coloniality of power’ hinges on the control of sexuality and gender as prerequisite for dividing bodies to operate reproduction and uphold nuclear family structures.”³⁸ Medicine, doctors and the operation of ‘bad medicalisation’, which centred on biological sex, are instruments of capitalism created for such an endeavour and especially impact upon intersex and trans people.

As previously explained, intersex people provide evidence that biological sex and gender are not binary and immutable, but instead biological sex consists of numerous variations. The experiences of intersex people both within medical institutions and society additionally highlights the extraordinary levels of commitment to binary ideas of gender and sex. It is no secret that intersex people directly challenge what has, over the course of the nineteenth and twentieth century in the Western world, been considered “the truth” about normality and abnormality, pathology and health, and sex and gender. A pronounced interest in intersex people’s bodies can be viewed in direct correlation with the “modernisation of medicine” in Western Europe during the late nineteenth and early twentieth centuries: “interested as it was in measuring, classifying, and mastering knowledge of the human body and its functions, normal and aberrant.”³⁹ With this focus on medicinal knowledge and the acquisition of expertise, Michel Foucault notes that in medicinal practices regarding the relationship between practitioners and their clients there was a shift from “a reliance on the judgement of individual patients with respect to their health and body to the expertise of the physician authorized to make judgments and to treat them.”⁴⁰ Accompanying this shift in power over the patients’ wellbeing and interests was what has been described as “bad

³⁷ Canli, “Binary by Design,” 653.

³⁸ Ibid., 654.

³⁹ Ellen K. Feder, *Making sense of intersex: changing ethical perspectives in biomedicine* (Indiana: Indiana University Press, 2014), 22.

⁴⁰ Ibid.

medicalization.”⁴¹ Erik Parens, who coined the term, highlighted how medicalisation takes “life or human” issues - problems that are not inherently medical in nature, but are deemed problems in how they relate to a social environment - and presents these issues in medical terms.⁴² Bad medicalisation characterises an issue or social incongruence into an issue that must be sorted through medical means, often constraining and objectifying people’s lives. This is particularly the case for intersex individuals, who are thus conceptualised as an ‘issue’, because their biological sex variation does not fit into the ‘human-made’ social construct of the sex binary and what it represents.

When bad medicalisation is imposed on intersex individuals, it often manifests in the form of ‘normalisation’, where intersex people are considered to have ‘atypical’ sex characteristics that ‘need’ to be regulated or contained in order for the individual to conform to societal expectations of gender and assigned sex. This simultaneously reinforces these expectations or norms. For instance, Foucault believed that medicine and medicinal practice to be at the centre of normalisation. He writes that those who hold power as a medical practitioner have positioned medicine as an authoritative device, which has the power to “distribute advice as to a healthy life, but also to dictate the standards for physical and moral relations of the individual and the society in which he [*sic*] lives”.⁴³ In regard to intersex individuals, this normalisation was highlighted in how they were classified in the late nineteenth-century onwards. The taxonomic system “dictated that females and males were defined as presenting only standard female or male anatomy, respectively,” and thus intersex people presented “different mixtures of male and female anatomy” rather than being considered another of a plethora of possible variations of biological sex.⁴⁴ This has been

⁴¹ Ibid., 25.

⁴² Ibid.

⁴³ Ibid., 33.

⁴⁴ Ibid., 34.

evident in researchers and clinicians' attention to intersex people, which revolves around "long-standing debates about what makes us feel male or female and what makes us attracted to men or women". As a result, intersex people have been construed as a challenge to ideas of personhood that centre sex and gender.⁴⁵ Consequently, physicians have grossly studied intersex bodies, often making them "a spectacle, both titillating and threatening, and one that would be controlled by medical authority."⁴⁶

Intersex people have been increasingly outspoken about their concepts of self and their identification or lack thereof with the labels 'woman' and 'man'. Their feelings are shaped by their experiences with medicine and the tension and complications that arises out of these experiences, as well as the lack of visibility and understanding of intersex people and issues amongst non-intersex people. For many intersex people, their interactions with medical practitioners have been traumatic. From unexplained, coercive surgeries to endless, repetitive examinations, intersex people often "recall a sense of discomfort, vulnerability, and humiliation".⁴⁷ For some, these feelings and tensions were directly linked to their sense of womanhood, manhood or personhood. Bittle recalls how she has always considered herself a feminist, but "could not find a way to be a woman and not be able to have children," especially as women are still often framed (and particularly so in TERF arguments) as being able to biologically have children.⁴⁸ She describes this feeling as being "degendered."⁴⁹ Bittle, who has XY chromosomes, spoke of the difficulty of not being able to talk about how this affected her identification, even to her husband: "I needed to talk sixteen hours a day about how I was feeling, and how do women have testes, and did this make me a lesbian, or did it make me a hermaphrodite, or did it mean that our marriage was illegal. It just had these

⁴⁵ Karkazis, *Fixing Sex*, 218.

⁴⁶ Feder, *Making sense of intersex*, 26.

⁴⁷ Karkazis, *Fixing Sex*, 222.

⁴⁸ *Ibid.*, 228.

⁴⁹ *Ibid.*

massive implications for me.”⁵⁰ Elissa Ford also shared her experiences with dealing with how being intersex affected her perception of her own womanhood, and the benefit that meeting other intersex women had on her sense of self, irrespective of society’s binary ideologies regarding sex and gender. Ford states that: “Meeting thirty other women was just so huge because I really didn’t think they existed. And then, finding out that they’ve gone through so many of the same things I’ve gone through was just amazing. Getting the full picture of my diagnosis, I really came to terms with the whole XY chromosome thing in that meeting.”⁵¹ These intersex women’s experiences highlight how the sex binary disqualifies them from womanhood regardless of their gender presentation, as the social meaning of their biology and in this case their inability to reproduce, means that they are not women.

Rupp, who is also intersex, discusses how a doctor described surgery to reduce their clitoris explicitly referred to the operation as a normalisation procedure, declaring that it would make Rupp “normal”.⁵² Rupp states: “to them [the doctors] I was abnormal, but in my mind I was normal until they started doing all the surgeries.”⁵³ These personal anecdotes illuminate what Ellen Feder notes in *Making Sense of Intersex: Changing Ethical Perspectives in Biomedicine*, that “there is a kind of cyclic movement constituting atypical sex as a threat, first to society, then to individual well-being and back again.”⁵⁴ This threat to society, and ultimately the sex binary and capitalism, is perceived as something that needs to be managed. It is apparent then that normalisation and bad medicalisation reinforces a heteronormative model of sexuality which, in turn, solidifies binary ideologies of sex and gender. This model centres:

the notion that genitals, bodies, behavior, sexual desire and behavior are linked in a straightforward and obvious way; that humans naturally fall into two distinct

⁵⁰ Ibid., 223.

⁵¹ Ibid., 233.

⁵² Ibid., 229.

⁵³ Ibid.

⁵⁴ Feder, *Making sense of intersex*, 22.

and discrete categories, male and female; that sexuality is naturally expressed only between two people of different genders; and that observed behavioral differences between male and females are given in nature.⁵⁵

In light of this, surgeries performed on intersex individuals attempt to reshape and restrain conceptions of personhood that challenge dominant binary perceptions of womanhood and manhood. In fact, in order to preserve binary sex conceptions of womanhood, surgeries on intersex people often operate with the assumption that ‘typical’ women want to and *should* reproduce, despite the existence of non-intersex women who also cannot reproduce.

Consequently, “female reproductive capacity has been privileged and protected: in cases of ambiguous genitalia, it has been more common to reassign a fertile male infant as female than the other way around.”⁵⁶ This makes it clear that binary ideologies concerning sex and gender reinforce traditional and outdated notions concerning womanhood and highlight a desire for control over what people should do with their bodies, attempting to ensure that their actions and capabilities are in line with patriarchal views. Thus, the enforcement of a biological sex binary is once again revealed to be extremely harmful for all women, as it perpetually recreates the conditions of their oppression.

The processes of normalisation and bad medicalisation, which function to reinforce binary ideologies of sex and gender and cement traditional views of womanhood and manhood, are also apparent in the discourse and interactions concerning transgender people. Such oppressive tools have augmented societal tensions surrounding competing definitions of personhood, particularly womanhood, resulting in transgender women being thrust into the spotlight and heavily scrutinised. Throughout transgender history, medical practitioners have had the power to render human difference in its various forms as pathological. This has been exacerbated by the fact that “medical services for transgender people has depended on

⁵⁵ Karkazis, *Fixing Sex*, 248.

⁵⁶ *Ibid.*, 249.

constructing transgender phenomena as symptoms of a mental illness or physical malady, partly because ‘sickness’ is the condition that typically legitimizes medical intervention.”⁵⁷

Part of this pathologisation has resulted in transgender being misconceptualised as a noun as opposed to an adjective, “as a kind of person rather than a descriptive quality”.⁵⁸

Subsequently rather than transgender women, cisgender women, transgender men, cisgender men or non-binary people being viewed as multiple types of women, men, or people, transgender people are seen as being ‘transgender’ as if it were a noun instead of an adjective. Conversely, cis people are seen as the ‘default’ aligning with heteronormative views concerning sex, gender and personhood.

As a result of the misconstruction of transgender identities as apart from the “normal”, or as being in pursuit of normalisation, transgender individuals and those perceived to be transgender are often subject to discrimination and violence. Transgender women, particularly Black transgender women, have been “disproportionately affected by denials of employment and housing, and by violent crimes against them, and have had greater needs to take political and self-protective action.”⁵⁹ As explored both here and in Chapter Two, competing definitions of womanhood within politics and society has resulted in “an emerging discourse in feminism that held all male-to-female transsexuals to be, by definition, violators of women, since they presented an ‘unwanted penetration’ into women’s space.”⁶⁰ However, an additional and oft less examined consequence of binary ideologies concerning sex and gender and their direct influence on competing definitions of personhood is the impact that this tension has on transgender people’s lives, especially when these binaries manifest in systems and structures of administration. In *Normal Life: Administrative Violence, Critical*

⁵⁷ Susan Stryker and Stephen Whittle, *Transgender History* (New York: Routledge, 2006), 37.

⁵⁸ *Ibid.*, 138.

⁵⁹ *Ibid.*, 78.

⁶⁰ *Ibid.*, 102.

Trans Politics, & the Limits of Law, Dean Spade notes that as transgender people often experience difficulty interacting with and existing in spaces that enforce gender categorisation, both gender and sex are exposed as non-neutral categories, despite their presentation as standard information collection of the population. Spade writes that:

The terms and categories used in the classification of data gathered by the state do not merely collect information about pre-existing types of things, but rather shape the world into those categories that, ultimately, are taken for granted by most and thus appear ahistorical and apolitical. Indeed, many such categorizations are assumed as basic truths.⁶¹

These supposed basic truths that sex and gender are binary affect transgender people's access to places and resources such as homeless shelters, public benefits, immigration, health insurance, driver licensing, foster care, social security and public bathrooms, among others. Difficulty accessing some of these services can cost the life of those whose identity conflicts with dominant perceptions of gender. For those who "feel that neither 'M' nor 'F' accurately describes their gender, there is no possibility of obtaining records that reflect their self-identities"; their access to such services is rendered even more difficult.⁶² Furthermore, gender and sex classification, and particularly binary classification, becomes increasingly problematic because reclassification policies often require people to have undergone various surgeries. However, as Spade notes, such surgeries are expensive since they are not covered under Medicaid. Thus, the bind that transgender people are placed in due to binary conceptions of gender and sex functions as a form of gatekeeping that is also classist. This bind becomes increasingly restrictive for trans women who seek to access 'transition-related' services. As previously stated, trans women are told that in order to access these services they need to 'prove' their womanhood, which often means adhering to stereotypical presentations of femininity. Yet, when they abide by such demands in order to move through the

⁶¹ Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, & the Limits of Law* (Durham: Duke University Press, 2015), 76.

⁶² *Ibid.*, 79.

gatekeeping process, they are accused of reinforcing traditional gender roles. This paradox that trans women frequently encounter highlights how competing definitions of womanhood and binary conceptions of sex and gender serve to exclude the most marginalised of groups.

Medicine and science serve an important function in determining which experiences and bodies are a legitimate and which achieve a sanctioned form of personhood. Crucially, medicine and science are also “social enterprises that reflect the ideas, assumptions, values, and beliefs of time and place.”⁶³ This means that what medicine and science deem ‘normal’, ‘healthy’, and ‘beneficial’ is contextual, mirroring societal mores. This also means that there is the potential for knowledge to evolve. Currently, however, normalisation in conjunction with bad medicalisation is an oppressive tool, regulating bodies and identities that fall outside of heteronormative conceptions of identity, and both calling into question and attempting to suppress the question of “why we value and prefer the normal”.⁶⁴ Analysing competing definitions of womanhood, manhood and personhood enables the interrogation of what is considered ‘normal’ to occur. In a “profit economy which needs outsiders as surplus people”, where outsiders are marginalised groups and those who do not conform to prescribed scripts of heteronormative identity, “institutionalized rejection of difference is an absolute necessity”.⁶⁵ Thus, as Catharine Mackinnon vividly put it, “difference is the velvet glove on the iron fist of domination.”⁶⁶ Difference is defined by power, and knowledge production about difference within populations is curated by “experts”. Thus, personal experience is rendered “emotional” or a form of identity politics and political correctness, and the dissemination of knowledge within medical arenas is morphed to fit the status quo.

Differences then become a signifier of power, because they are ascribed value. The more

⁶³ Karkazis, *Fixing Sex*, 240.

⁶⁴ Ibid., 234.

⁶⁵ Lorde, *The Audre Lorde Compendium*, 163.

⁶⁶ Catharine Mackinnon, *Toward a feminist theory of the state* (Cambridge: Harvard University Press, 1989), 219.

one's personhood aligns with heteronormative and patriarchal ideals, the more privileged that person will be within society.

Reforming and unlearning outdated definitions of womanhood is explicitly tied to unlearning binary ideologies of sex and gender, and understanding that "sex in nature is not a bipolarity, it is a continuum; society makes it into a bipolarity."⁶⁷ Undoubtedly, as a result it becomes important to understand who is gatekeeping definitions of womanhood, and who such definitions actually benefit. Lorde asserts that:

The future of our earth may depend upon the ability of all women to identify and develop new definitions of power and new patterns of relating across difference. The old definitions have not served us, nor the earth that supports us. The old patterns, no matter how cleverly rearranged to imitate progress, still condemn us to cosmetically altered repetitions of the same old exchanges, the same old guilt, hatred, recrimination, lamentation, and suspicion.⁶⁸

As the old definitions that Lorde here refers to are patriarchal, racist, sexist and transphobic (as illustrated earlier), it becomes increasingly important that society and individuals seek to unlearn and "escape... that piece of the oppressor which is planted deep within each of us, and which knows only the oppressor's tactics, the oppressors' relationships", which have for too long dictated how individuals view difference in relation to womanhood and personhood.⁶⁹ Allowing for new definitions of womanhood that highlight just how oppressive old definitions are and emphasise who such definitions have historically served is imperative to combat the subjugation of all groups harmed in a patriarchal society. For indeed, "change means growth, and growth can be painful. But we sharpen self-definition by exposing the self in work and struggle together with those whom we define as different from ourselves, although sharing the same goals."⁷⁰ Lorde's reflections on the differences between women and how women as a collective choose to deal with those differences proves to be of

⁶⁷ Ibid., 233.

⁶⁸ Lorde, *The Audre Lorde Compendium*, 170.

⁶⁹ Ibid.

⁷⁰ Ibid.

fundamental importance upon examining competing definitions of womanhood. These reflections illuminate how such definitions oppress all women, including those who insist on elevating their difference as a sign of superiority and believe only themselves to be ‘real’ women.

Conclusion

Since before a child is born the sex binary is already enforced upon them. Even when still in the womb, the baby's sex is questioned: "Do you know if you are having a boy or girl?" Upon examination of an ultrasound scan, or following the birth of the baby if their external genitalia is not ambiguous, the resounding phrase "It's a boy/girl" is joyously declared. And then there was [the baby's] sex. With this utterance their sex and gender identity is brought into being as the social components and binary expectations of the phrase "It's a boy/girl" fall upon the baby. Such is the weight of this binary designation that its revelation is made into a spectacle. For instance, within the U.S. gender-reveal parties announcing the sex of a baby soon-to-be-born will often reveal the sex through items such as a cake or confetti in one of two colours for the binary; blue for boys and pink for girls. This template for gender-reveal parties was first established in 2008 by Jenna Karvunidis, who shared photos of a gender-reveal party for her first child on her blog. A number of copycats soon followed, and the custom quickly spread thanks to social media.¹ However, several of these parties have resulted in devastating consequences. Earlier this month, a smoke-generating pyrotechnic device that was used at a gender-reveal party caused a wildfire that scorched over 21,000 acres east of Los Angeles, resulting in the death of a firefighter.² Puzzlingly, this was by no means the first incident in which a gender-reveal party resulted in a wildfire, death or severe damages. In 2017, a gender-reveal party sparked a wildfire in Arizona resulting in over \$8 million in damages and destroyed at least 45,000 acres of land.³ At another gender-reveal party last July:

a car inadvertently burst into blue flames. That September, a crop-dusting plane crashed after dumping thousands of gallons of pink water across a field in Texas.

¹ Taylor Lorenz, "Are Gender Reveals Cursed?" *The New York Times*, September 10, 2020, <https://www.nytimes.com/2020/09/10/style/gender-reveal-parties-cursed.html>.

² Ibid.

³ Ibid.

The following month, a woman was killed by flying debris from a device meant to shoot out colored smoke in Knoxville, Iowa.⁴

The spectacle of the ‘discovery’ of the binary sex of a baby is further augmented when, upon finding out whether the child is a boy or girl, there is a rush to buy ‘sex-appropriate’ items. As Canli writes:

Since children look ‘sexless’ or ‘neutral’ in their physical characteristics, such colour codes are used to demarcate and emphasize their assigned sexes and genders even before they are born... the new-born’s sex gets materially designated through colours that are pink or blue; from toys and clothes to cradles, diapers and pacifiers.⁵

The sex binary thus imposed on us from birth does not solely show itself in the pink/blue colour codes dichotomy, but also in the types of toys that children are allowed to play with or are marketed towards them. Whether it be dolls for girls and cars for boys, the idea that certain products are masculine or feminine and are therefore appropriate for either boys or girls respectively “corroborate[s] femininity and masculinity as fixed categories from childhood to adulthood” presenting binary gender roles and a biological binary sex as fixed.⁶

The material designation of the sex binary is very much both a product of and a means to perpetuate capitalism. The pink and blue dichotomy emerged “as a product of post-war Western capitalism in an attempt to merchandise more products for differentiated niche markets,” and was disseminated worldwide.⁷ Today, we see how companies are able to sell multiples of the same product by branding and marketing it differently to men and women, such as razors and perfume. The difference in marketing often reinforces the sex and gender binary, with women’s products generally appearing in brighter and more vibrant colours than the men’s. Even as social mores subtly change and the marketization of products changes with it, branding is still concerned with the binaries. For example, as personal hygiene has

⁴ Ibid.

⁵ Canli, “Binary by Design”, 659.

⁶ Ibid.

⁷ Ibid., 652.

become socially acceptable for men as well as women, soaps, shampoos and skincare products have been increasingly marketed towards men. However, these products emphasise retaining one's masculinity, by looking fresh, sharp and manly. Hence, the material designation of the sex binary through capitalism and the consequential reproduction of gender roles serve to solidify the sex binary and its insidious nature.

Decolonial thinkers' investigations into how the sex binary has become so ingrained within Western society through colonisation, capitalism and industrialisation have shed light on the sex binary's racist, classist and destructive origins. Scholars Quijano, Lugones and Mignolo illustrate that "the 500-year-old Western domination over the globe has been sustained not only through extermination and structural exploitation of the peoples [indigenous to the lands that were invaded], but also through systematic corporeal segregation and othering."⁸ The sex binary was forcefully imposed on those within the lands that the West took upon itself to uproot, erasing their cultures. In order to facilitate this mass erasure, "Western hegemony enforced the binary system of thinking, deploying the 'modern', 'enlightened' and 'civilized' subject at the centre, while externalizing any living being or idea that would challenge this rationale to the total opposite, as the 'other'."⁹ Similarly, Olufemi highlights that colonialism was significant in rendering sexual and gender practices within the countries that were being invaded as taboo, citing religious and imperialist values concerning 'natural order' supporting the implementation of the sex binary.¹⁰ Olufemi notes that expressions of gender variance as well as 'homosexual' acts between men were outlawed through penal law in countries such as Kenya, Australia, India and Uganda.¹¹ The hegemonic nature of the sex binary as a result of its violent perpetuation across the globe has resulted in

⁸ Ibid.

⁹ Ibid.

¹⁰ Olufemi, *Feminism Interrupted*, 54.

¹¹ Ibid.

its affecting every aspect of human life, and is inseparable from racism and classism as a result of its enactment.

Just as the sex binary was used as a colonial and capitalist tool to organise and exert violence through the ‘governance’ of indigenous people, it is evident that the sex binary still indeed functions in this way in the West. The sex binary and its depiction as an immutable reality functions as a form of biopolitics and an instrument of biopower. It is through biopolitics that governments are able to organise their populations without ostensibly interfering with people’s lives, and yet still maintain capital accumulation. As has been previously highlighted, the obvious and direct intervention into people’s lives by the U.S. government in relation to defining biological sex, whether it be by the Obama administration or the Trump administration, has triggered an immense amount of backlash. The sex binary has been constructed as a fundamental tool through which people’s lives are regulated and furthermore, through which individual’s regulate their own lives. This mechanism, which supposedly tells people about themselves, can cause the population to be forced to reconsider how they view themselves and the authenticity of how they had previously governed their own lives when it is presented as unstable or subject to change. This predicament can be too unsettling for some, and so they require the stability of a fixed sex binary to orchestrate their lives and actions, leading to their becoming nostalgic for it. The insidious nature of the sex binary lays the groundwork for nostalgia to be bred, because the sex binary’s pervasive presence within Western society makes it appear ‘normal’ and ‘common sense’ due to its constant (re)affirmations as simply a natural part of human life.

Binaries are additionally present in technology as a form of biopower, constantly relaying to individuals ways of being that are sanctioned and those that are not. Even as technology and digitalisation becomes increasingly important in society, and the “computerization of production, marketing and distribution continues at a rapid pace,” the use

of algorithms as an oppressive and discriminatory tool has begun to be examined.¹² From the “unreadability of black bodies in facial recognition technologies,” to the excessive and inappropriate censoring of Black bodies, fat bodies and women’s bodies on social media, “racial and colonial disparities are sustained through biometrics, surveillance programs and ‘smart’ solutions which continue to be designed and spread according to binary codes.”¹³ This is unsurprising on account of the “male dominance and a masculine ethos of computer science” and the technology sphere.¹⁴

The violence of the sex binary and its hegemonic form of governance shines through when people’s bodies and existence challenge it. Seeds of nostalgia are evidently sown through the bad medicalisation of intersex and transgender people. The oppressive nature of medicine and the power that medical practitioners have to exert the sex binary in a violent manner in accordance with the state is revealed in the unnecessary coercive non-consensual surgeries forced upon intersex babies. Through these surgeries, the state is able to cosmetically erase sex variance and propose a sex binary that is supposedly, self-evidently biological and immutable in nature. Consequently, the sex binary as a ‘natural’ fact is reinforced, and those that challenge this ‘truth’ are suppressed in order to obscure the human intervention within the sex binary which enables its sustainment. Additionally, due to their deviance from the narrative of immutable, binary, biological sex, transgender people have also been the subject of pathologisation, augmented by bad medicalisation practiced by medical professionals. As a body’s incongruence with the sex binary in relation to the construction of an individual’s identity is deemed an issue by society, transgender people have been conceptualised as another anomaly where the body needs to be corrected or intervened with, rather than inspiring an adjustment of society’s concept of gender and sex.

¹² Acker, “Gender, Capitalism and Globalization,” 32.

¹³ Canli, “Binary by Design,” 658.

¹⁴ Acker, “Gender, Capitalism and Globalization,” 32.

Thus the existence of intersex and trans people threatens the sex binary and therefore must be presented as an anomaly through medical practices in order to keep the myth that biological sex is binary and immutable alive.

Design and architecture have played and continue to play a fundamental role in (re)producing the sex binary. As a tool of capitalism, design has functioned to cement the sex binary as natural, present sex-variance as non-existent, and provide those who desire stability with a concrete grounds to direct their nostalgia towards. Those nostalgic for when there were ‘only two sexes’ use the sex binary’s integration into design as evidence to justify their longing for the binary, as they believe such architecture represents a fixed ‘past’ and wish to embed it into the present. The sex-segregated public bathroom and the discourse of the bathroom debate that has erupted over the last decade – which stems from the perceived threat to the sex binary posed by transgender people’s existence and their desire to use the bathroom that corresponds with their gender – reveals that the bathroom is an extremely political arena as a result of its design. Despite the sexist, racist and classist origins of public bathroom’s binary nature, the bathroom has been perpetually presented as a site of reverence, an almost sacred space that, if ‘transformed’ by allowing transgender people to pee, would wreak havoc within society and consequently cause rampant immorality.

Such fears and policing surrounding the public bathroom and those who have access to it, highlights how people who already feel unstable and anxious within the bathroom because of the bodily processes that occur in this setting, desire the security and stability that they locate within binaries. As a result, design and architecture becomes both an object of and a shrine to nostalgia. In this instance, the bathroom debates illustrate how people not only look to the public bathroom as a concrete record of biological sex being binary and fixed, but desire this anchor in order to justify their fears and discrimination. As “design has been one of the first-hand agencies in reproducing these binary gender, sexuality and other identity

categories, and inciting unequal distribution of power,” the public bathroom’s function as an oppressive site is important when interrogating how the public bathroom operates as a site of nostalgic longing.¹⁵

Design and architecture’s function in (re)producing the sex binary is particularly important to address since sex-segregated spaces have become a prime battleground upon which moral debates about the immutability of the sex binary, and nostalgia towards it, are held. The proliferation of bathroom bills throughout the U.S. and following debates demonstrate how politicians play into public fears surrounding morals and personal instability. These debates generate nostalgia, as those against transgender inclusion seek a time when sex-segregation was a given. Hence, those governing who are aligned with the Trump administration (re)define sex as binary and immutable in order to satisfy the desire for the sex-segregation of public spaces such as bathrooms. The construction of those who challenge the sex binary and their access to sex-segregated public spaces as morally deviant is neither an accident nor a new phenomenon. The image of the trans woman as a sexual predator in the sex-segregated public bathroom is reminiscent of the image of the Black man as a sexual predator in race-segregated public bathrooms. Both cases in particular reinforce the notion that a person’s biology inherently makes them more likely to commit acts of sexual violence, whilst also painting the people with those biologies as monolithic groups. Since the public bathroom is a site in which individuals feel vulnerable, due to its status as a space demarcated for the depositing of fluids that can contaminate, binaries become a means of policing other people within the space under the guise of ‘safety’. Though the safety of individuals using the bathrooms is presented as the aim of these debates, “such places, strictly designed to conform to the heterosexual matrix, are extremely unsafe for these [gender non-conforming] bodies, where many queer and gender-variant individuals are constantly exposed

¹⁵ Canli, “Binary by Design,” 655.

to verbal, physical and even lethal assaults”.¹⁶ Thus, it is only cisgender and gender-conforming people’s safety, and their sense of safety and security in the sex-binary that is being protected.

The use of morals and ‘science’ to insist on the importance of biological sex being understood as binary and immutable within feminism has also resulted in trans women and intersex women being denied womanhood status. The social meaning of biology within feminism has led TERFs to believe that women have specific biological attributes and capabilities that are fundamentally distinct from men; ergo trans women and intersex women are not women. This ideology is not solely specific to the U.S., but is prevalent in countries such as the U.K. and Australia: a development that is unsurprising due to the colonial nature of the sex binary. From prominent British author J.K. Rowling’s recent transphobic essay, to the Black intersex athlete Caster Semenya’s exclusion from women’s races unless she suppresses her natural hormone levels, those whose bodies and identities do not align with the idea that biological sex is binary and immutable are met with resistance and oppression at every turn. Thus, their status as women is denied.

Although both the binary ideology of sex and the recent attempts to define biological sex as binary and immutable within U.S. law have superficially been presented as exclusively harmful to trans and intersex people, the removal of healthcare and employment protections enables the removal of cisgender and non-intersex people’s protections too. This is especially the case for cis women. Even as the Trump administration sought to erase transgender healthcare protections in June, the proposed rule would have correspondingly eliminated “anti-discrimination protections for patients with a history of pregnancy termination,” as well as rolled back “requirements that providers and insurers must routinely notify patients about

¹⁶ Ibid., 662.

the availability of foreign language translations of important documents.”¹⁷ Therefore, it is not only transgender and intersex people that are negatively impacted by the sex binary and the denial of their rights. Cisgender and non-intersex people, especially people of colour, are also affected. In addition to Black women and gender non-conforming women often being denied womanhood status as a result of their perceived transgression of the sex binary, women’s abortion rights and sexual autonomy also appear to be being taken away by the Trump administration in the same breath. When a group’s civil rights begin to get chipped away, anything that threatens capitalism or the cementing of the sex-binary – in this case also Republican voter-ship on moral or religious grounds – is at risk. As rich white cisgender straight men have the most social power to oppress others, they are also the most invested in extending their hegemony and capital through the systems that were built to violently assert their dominance. It is these rich white cis straight men that the sex binary and the seeds of nostalgia sown within society is ultimately built to serve.

¹⁷ Sanger-Katz and Welland, “Trump Administration Erases Transgender Civil Rights Protections in Health Care,” June 12, 2020.

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